

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 Association. All submissions should refer to file number SR-NASD-2002-147 and should be submitted by December 10, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46817; File No. SR-NASD-2002-148]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 by the National Association of Securities Dealers, Inc. Relating to the Regulatory Fee and the SEC Section 31 Transaction Fee

November 12, 2002.

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 October 18, 2002, the National Association of Securities Dealers, Inc. ("NASD" or "Association") 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 NASD. The Association amended the proposed rule change on November 5, 2002.<sup>3</sup> On November 8, 2002, the NASD again amended the proposal.<sup>4</sup> The Commission is publishing this notice to solicit

comments on the proposed rule change, as amended, from interested persons.

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

The NASD proposes to amend Schedule A to the NASD By-Laws to amend its member regulatory pricing structure. Under the structure this rule proposal is intended to change, three types of fees and assessments are used to fund the NASD's member regulatory activities: Regulatory Fee,<sup>5</sup> Personnel Assessment, and Gross Income Assessment.<sup>6</sup> The proposed restructuring is comprised of four amendments: (1) Eliminate the Regulatory Fee; (2) institute a new transaction-based Trading Activity Fee ("TAF") similar to the SEC's Section 31 Fee; (3) increase the rates assessed to member firms under the Personnel Assessment; and (4) implement a simplified three-tiered flat rate for the Gross Income Assessment and eliminate current deductions and exclusions.<sup>7</sup> This rule filing is to be read as a part of a package of two separate yet related rule filings<sup>8</sup> submitted to the SEC as a result of a review of the overall NASD pricing structure<sup>9</sup> and is intended to address the first two amendments to NASD pricing restructuring by eliminating the Regulatory Fee and instituting a new transaction-based TAF.

These fees assessed upon and paid by member firms are used by the NASD to fund NASD's member regulatory activities, including the supervision and regulation of members through examinations, processing of membership applications, financial monitoring, policy, rulemaking, interpretative, and enforcement activities. These amendments to this pricing structure are intended to serve the following purposes: (1) Simplify the NASD's fee structure; (2) ensure fairness in the NASD's fee structure by assessing higher fees to those member firms that require more NASD regulatory services; (3) assess a transaction-based fee in a manner that, unlike the Regulatory Fee,

does not influence where members choose to execute trades; (4) reduce the cyclical nature of the current NASD fee structure; and (5) eliminate the NASD's reliance on funds generated from the Regulatory Fee on transactions executed through Nasdaq.

The NASD believes assessing Regulatory Fees only for Nasdaq transactions is no longer appropriate for three reasons. First, Nasdaq is separating from the NASD and registering as a national securities exchange. Second, the current fee structure is out of step with recent changes in the markets, such as the drastic growth in trading volumes, reductions in average trade size, decimalization, and trading no longer remaining exclusive to the listing exchange. Finally, the Regulatory Fee is only assessed against Nasdaq-listed and other transactions that are reported through the Automated Confirmation Transaction (ACT) system,<sup>10</sup> although these fees are used to support member regulatory activities across all markets.

In the instant proposed rule change, the NASD is including the TAF rates (retroactively effective to October 1, 2002, but giving members until January 15, 2003 to remit fees for the preceding quarter), including a reference to *Notice to Members 02-75* (issued on October 30, 2002 and discussing the TAF), and making minor technical, non-substantive changes to the proposed rule change. In addition, certain footnotes containing TAF rates have been deleted (because the TAF rate information is now included in the body of the proposed rule language).

Below is the text of the proposed rule change. The text below shows amended rule language that would be necessary if SR-NASD-2002-98 were not in place.<sup>11</sup> Proposed new language is in italics; proposed deletions are in brackets.

Schedule A to [the] NASD By-Laws

Assessments and fees pursuant to the provisions of Article VI of the By-Laws of [the] NASD shall be determined on the following basis.

\* \* \* \* \*

<sup>15</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> See November 4, 2002 letter from Barbara Z. Sweeney, Senior Vice President ("SVP") and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, and attachments ("Amendment No. 1"). Amendment No. 1 completely replaced and superseded the original proposed rule change.

<sup>4</sup> See November 7, 2002 letter from Barbara Z. Sweeney, SVP and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division, Commission, and attachments ("Amendment No. 2"). Amendment No. 2 completely replaced and superseded Amendment No. 1 and the original proposed rule change.

<sup>5</sup> The Regulatory Fee is described in section 8(a) of Schedule A to NASD By-Laws.

<sup>6</sup> The Personnel Assessment and Gross Income Assessment are described in Section 1 of Schedule A to NASD By-Laws.

<sup>7</sup> The changes resulting from the proposed restructuring would be revenue neutral.

<sup>8</sup> See also SR-NASD-2002-99.

<sup>9</sup> The NASD, in its pricing restructuring review, proposed changes to the Regulatory Fee in *Special Notice to Members 02-09* and requested comments. The NASD received a number of comments. In response to those comments, the proposal set forth in *Special Notice to Members 02-09* is not being pursued.

<sup>10</sup> This package of filings proposed rule changes to NASD's Member Regulation fees. It is not related to the recent Nasdaq filing regarding Nasdaq's Regulatory Fee. See Nasdaq SR-NASD-2002-61.

<sup>11</sup> The Commission notes that, because SR-NASD-2002-98 was effective upon filing with the Commission, the rule language that was proposed in SR-NASD-2002-98 is in fact a rule. The Commission recognizes, however, that the instant filing presents rule language that would be necessary if SR-NASD-2002-98 were not an established rule to more clearly demonstrate how the NASD's member regulatory pricing structure is proposed to be amended by the recent filings described in this proposed rule change.

Section [8] 2—Member Regulatory [Transaction] Fees

(a) NASD fee on cleared transactions. Each member shall be assessed a transaction charge of \$.0625 per 1,000 shares, with a minimum charge per side of \$.025 and a maximum charge per side of \$.46875 for each over-the-counter transaction with another member of the Association reportable through ACT in which the member acts either as an agent or a principal for the purchase and/or sale of equity securities.]

(b) SEC transaction fee. Each member shall be assessed a SEC transaction fee. The amount shall be determined by the SEC in accordance with Section 31 of the Act.]

(a) Recovery of cost of services. NASD shall, in accordance with this section, collect member regulatory fees that are designed to recover the costs to NASD of the supervision and regulation of members, including performing examinations, processing of membership applications, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. NASD shall periodically review these revenues in conjunction with these costs to determine the applicable rate. NASD shall publish notices of the fees and adjustments to the assessment rates applicable under this section.

(b) Each member shall be assessed a Trading Activity Fee for the sale of covered securities.

(1) Covered Securities. For purposes of the rule, covered securities shall mean:

(i) All exchange registered securities wherever executed (other than bonds, debentures, and other evidence of indebtedness);

(ii) All other equity securities traded otherwise than on an exchange; and

(iii) All security futures wherever executed.

(2) Transactions exempt from the fee. The following shall be exempt from the Trading Activity Fee:

(i) Transactions in securities offered pursuant to an effective registration statement under the Securities Act of 1933 (except transactions in put or call options issued by the Options Clearing Corporation) or offered in accordance with an exemption from registration afforded by Section 3(a) or 3(b) thereof, or a rule thereunder;

(ii) Transactions by an issuer not involving any public offering within the meaning of Section 4(2) of the Securities Act of 1933;

(iii) The purchase or sale of securities pursuant to and in consummation of a tender or exchange offer;

(iv) The purchase or sale of securities upon the exercise of a warrant or right

(except a put or call), or upon the conversion of a convertible security; and

(v) Transactions that are executed outside the United States and are not reported, or required to be reported, to a transaction reporting association as defined in Rule 11Aa3-1 and any approved plan filed thereunder.

NASD may exempt other securities and transactions as it deems appropriate.

(3) Fee Rates\*

(i) Each member shall pay to NASD a fee per share for each sale of a covered equity security.

(ii) Each member shall pay to NASD a fee per contract for each sale of an option.

(iii) Each member shall pay to NASD a fee for each round turn transaction (treated as including one purchase and one sale of a contract of sale for future delivery) of a security future.

\*Trading Activity Fee rates are as follows: Each member shall pay to NASD \$0.00005 per share for each sale of a covered equity security, with a maximum charge of \$5 per trade; \$0.002 per contract for each sale of an option; and \$0.04 per contract for each round turn transaction of a security future. In addition, if the execution price for a covered security is less than the Trading Activity Fee rate (\$0.00005 for covered equity securities, \$0.002 for covered option contracts, or \$0.04 for a security future) on a per share, per contract, or round turn transaction basis then no fee will be assessed.

(4) Reporting of Transactions. Members shall report to NASD the aggregate share, contract, and/or round turn volume of sales of covered securities in a manner as prescribed by NASD from time to time.

Section 3—SEC Transaction Fee

Each member shall be assessed an SEC transaction fee. The amount shall be determined by the SEC in accordance with Section 31 of the Act.

Section [2] 4—Fees

(a) Each member shall be assessed a fee of \$75.00 for the registration of each branch office, as defined in the By-Laws. Each member shall be assessed an annual fee for each branch office in an amount equal to the lesser of (1) \$75.00 per registered branch, or (2) the product of \$75.00 and the number of registered representatives and registered principals associated with the member at the end of [the Association] NASD's fiscal year.

(b) [The] NASD shall assess each member a fee of:

(1) \$85.00 for each initial Form U-4 filed by the member with [the] NASD

for the registration of a representative or principal, except that the following discounts shall apply to the filing of Forms U-4 to transfer the registration of representatives or principals in connection with acquisition of all or a part of a member's business by another member:

Number of registered personnel transferred	Discount
1,000—1,999 .....	10%
2,000—2,999 .....	20%
3,000—3,999 .....	30%
4,000—4,999 .....	40%
5,000 and over .....	50%

(2) \$40.00 for each initial Form U-5 filed by the member with [the] NASD for the termination of a registered representative or registered principal, plus a late filing fee of \$80.00 if the member fails to file the initial Form U-5 within 30 days after the date of termination;

(3) through (5) No Change.

(c) through (k) No Change.

(l)(1) Unless a specific temporary extension of time has been granted, there shall be imposed upon each member required to file reports, as designated by this paragraph, a fee of \$100 for each day that such report is not timely filed. The fee will be assessed for a period not to exceed 10 business days. Requests for such extension of time must be submitted to [the Association] NASD at least three business days prior to the due date; and

(2) through (3) No Change.

\* \* \* \* \*

Section [3] 5—Elimination of Duplicate Assessments and Fees

No Change to rule language.

\* \* \* \* \*

Section [4] 6—Assessments and Fees for New Members, Resigning Members and Successor Organizations

(a) The assessment of a firm, which is not a member throughout [the Association] NASD's full calendar year from January 1 to December 31, shall be based upon the number of quarter years of membership. The proration for a new member shall include the quarter year in which the member is admitted to membership. The proration for a member which resigns shall include the quarter year in which the member's letter of resignation is received in [the Association] NASD's Executive Office.

(b) A member [which] that is a successor organization to a previous member or members shall assume the unpaid balance of the assessments of its predecessor or predecessors and its next

assessment shall be determined, if applicable, upon the assessment data of its predecessors. Such successor member shall not be required to re-register branch offices and personnel of predecessor members or pay registration fees therefor. Whether a member is the successor organization to a previous member or members shall be determined by [the Association] *NASD* upon a consideration of the terms and conditions of the particular merger, consolidation, reorganization, or succession. A member [which] *that* has simply acquired the personnel and offices of another member under circumstances [which] *that* do not constitute the member a successor organization shall not be required to assume the unpaid assessments of the other member. Such non-successor member shall be required to re-register the branch offices and personnel acquired from the other member and pay applicable registration fees.

*Section [5] 7—Gross Revenue for Assessment Purposes*

No Change to rule language.

*Section [6] 8—Fees for Filing Documents Pursuant to the Corporate Financing Rule*

(a) There shall be a fee imposed for the filing of initial documents relating to any offering filed with [the] *NASD* pursuant to the Corporate Financing Rule equal to \$500 plus .01% of the proposed maximum aggregate offering price or other applicable value of all securities registered on an SEC registration statement or included on any other type of offering document (where not filed with the SEC), but shall not exceed \$30,500. The amount of filing fee may be rounded to the nearest dollar.

(b) There shall be an additional fee imposed for the filing of any amendment or other change to the documents initially filed with [the] *NASD* pursuant to the Corporate Financing Rule equal to .01% of the net increase in the maximum aggregate offering price or other applicable value of all securities registered on an SEC registration statement, or any related Rule 462(b) registration statement, or reflected on any Rule 430A prospectus, or included on any other type of offering document. However, the aggregate of all filing fees paid in connection with an SEC registration statement or other type of offering document shall not exceed \$30,500.

*Section [7] 9—Service Charge for Processing Extension of Time Requests*

(a) No Change.

(b) The service charge for processing each initial extension of time request and for all subsequent extension of time requests (1) involving the same transaction under Regulation T and/or (2) involving an extension of time previously granted pursuant to Rule 15c3-3(n) shall be \$2.00; provided, however, that the service charge shall be \$1.00 for extension of time requests filed electronically by members using [the Association] *NASD's* Automated Regulatory Reporting System.

\* \* \* \* \*

*Section [9] 10—Subscription Charges for Firm Access Query System (FAQS)*

No Change to rule language.

*Section [10] 11—Request for Data and Publications*

No Change to rule language.

*Section [11] 12—Reserved*

No Change to rule language.

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*Section [12] 13—Application and Annual Fees for Member Firms With Statutorily Disqualified Individuals*

(a) Any member firm seeking to employ or continuing to employ as an associated person any individual who is subject to a disqualification from association with a member as set forth in Article III, Section 4 of [the Association] *NASD's* By-Laws shall, upon the filing of an application pursuant to Article III, Section 3, paragraph (d) of [the Association] *NASD's* By-Laws, pay to [the Association] *NASD* a fee of \$1,500.00. Any member firm whose application filed pursuant to Article III, Section 3, paragraph (d) of [the Association] *NASD's* By-Laws results in a full hearing for eligibility in [the Association] *NASD* pursuant to the Rule 9640 Series, shall pay to [the Association] *NASD* an additional fee of \$2,500.00.

(b) Any member firm continuing to employ as an associated person any individual subject to disqualification from association with a member as set forth in Article III, Section 4 of [the Association] *NASD's* By-Laws shall pay annually to [the Association] *NASD* a fee of \$1,500.00 when such person or individual is classified as a Tier 1 statutorily disqualified individual, and a fee of \$1,000.00 when such person or individual is classified as a Tier 2 statutorily disqualified individual.

*Section [13] 14—Review Charge for Advertisement, Sales Literature, and Other Such Material Filed or Submitted*

There shall be a review charge for each and every item of advertisement, sales literature, and other such material, whether in printed, video or other form, filed with or submitted to [the Association] *NASD*, except for items that are filed or submitted in response to a written request from [the Association] *NASD's* Advertising Regulation Department issued pursuant to the spot check procedures set forth in [the Association] *NASD's* Rules as follows: (1) for printed material reviewed, \$75.00, plus \$10.00 for each page reviewed in excess of 10 pages; and (2) for video or audio media, \$75.00, plus \$10.00 per minute for each minute of tape reviewed in excess of 10 minutes.

Where a member requests expedited review of material submitted to the Advertising Regulation Department there shall be a review charge of \$500.00 per item plus \$25 for each page reviewed in excess of 10 pages. Expedited review shall be completed within three business days, not including the date the item is received by the Advertising Regulation Department, unless a shorter or longer period is agreed to by the Advertising Regulation Department. The Advertising Regulation Department may, in its sole discretion, refuse requests for expedited review.

\* \* \* \* \*

**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 *NASD* 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 *NASD* 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

On July 24, 2002, the *NASD* filed SR-*NASD*-2002-98 and SR-*NASD*-2002-99, which proposed a new member

regulatory pricing structure.<sup>12</sup> By filing SR-NASD-2002-147, the NASD is establishing a sunset provision for the TAF. The TAF, as established in SR-NASD-2002-98, will cease to exist after December 31, 2002, and the member regulatory pricing structure will revert to section 8 of Schedule A of the By-Laws as amended, absent further action. The NASD is sunsetting the changes made to the TAF in SR-NASD-2002-98 in response to member comments asserting that a full notice and comment period would be beneficial to NASD members. In addition, the NASD would like an opportunity to review its published rates. Further, the NASD is amending Schedule A, section 2 of the By-Laws to correct language that was mistakenly referenced in SR-NASD-2002-98.<sup>13</sup> The instant proposed rule change includes the TAF rates (retroactively effective to October 1, 2002, but allowing members until January 15, 2003 to remit such fees) and inserts the rate language into section 2. In addition, the instant proposed rule change updates certain footnotes to include a reference to *Notice to Members 02-75* (issued October 30, 2002 and discussing the TAF), deletes footnotes that included TAF rates and inserts the TAF rate information in the body of the proposed rule language, and makes minor technical, non-substantive changes to the proposed rule change.

On September 27, 2002, the NASD announced the initial TAF rates. The TAF rates were as follows:

- \$0.0001 per share for each sale of a covered equity security.
- \$0.002 per contract for each sale of an option.
- \$0.08 per contract for each round turn transaction of a security future.

On October 3, 2002, in response to members' comments, the NASD modified the TAF rates to incorporate a per trade maximum, retroactively effective to October 1, 2002. The revised TAF rates were modified as follows:

- For each sale of a covered equity security, each member shall pay to the

NASD \$0.0001 per share, with a maximum charge of \$10 per trade.

- For each sale of an option, each member shall pay to the NASD \$0.002 per contract.
- For each round turn transaction of a security future, each member shall pay to the NASD \$0.08 per contract.
- Additionally, if the execution price for a covered equity security is less than the TAF rate (\$0.0001) on a per share basis, then no fee will be assessed.

On October 18, 2002, the NASD filed two subsequent proposed rule changes with the Commission that are directly related to SR-NASD-2002-98. The first proposed rule change was SR-NASD-2002-147, which was effective upon filing with the Commission. SR-NASD-2002-147 established a sunset provision that terminates on December 31, 2002 the changes made to Schedule A to the NASD By-Laws in SR-NASD-2002-98. In addition, language that was mistakenly referenced in SR-NASD-2002-98 was corrected in SR-NASD-2002-147.

The second proposed rule change is the instant filing, which contains substantially the same proposed rule language as proposed in SR-NASD-2002-98, but is filed pursuant to section 19(b)(1) of the Act<sup>14</sup> to allow for an additional notice and comment period. The NASD filed SR-NASD-2002-148 in response to comments made by NASD members that the TAF should not be filed as immediately effective, but instead should be given a full notice and comment period. In addition, this subsequent comment period allows the NASD to examine further the impact of the published TAF rates currently in effect, and to adjust the TAF rates accordingly if they are inconsistent with the NASD's overall intent that the amendments to its pricing structure be revenue neutral. The NASD intends that SR-NASD-2002-148 be read in conjunction with SR-NASD-2002-99. The two separate yet related proposed rule changes are the result of a review of the overall NASD pricing structure, and will be used to fund the NASD's member regulatory activities.

On January 1, 2003, if the Commission has not approved SR-NASD-2002-148, the TAF as established in SR-NASD-2002-98 will terminate and will revert to Section 8 of Schedule A of the By-Laws as amended, until such time that an approved alternative funding source is in place.

On October 30, 2002, based on further analysis of trading volumes and feedback from member firms, the NASD further adjusted the rate structure. The

NASD revised the TAF (retroactively effective to October 1, 2002, but allowing members until January 15, 2003 to remit such fees), as follows:

- The initial rate of \$0.0001 for covered equity securities was reduced to \$0.00005.
- The maximum charge on covered equity securities was reduced to \$5.00.
- The initial rate of \$0.08 for security futures was reduced to \$0.04.
- The minimum exclusion was extended to cover options and futures, clarifying that if the execution price for a covered security is less than the TAF rate on a per share, per contract, or round turn transaction basis, then no fee will be assessed.

## 2. Statutory Basis

The NASD believes that the proposed rule change is consistent with the Act, including section 15A(b)(5) of the Act,<sup>15</sup> which requires among other things, that the NASD's rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that NASD operates or controls. The NASD believes that the TAF is objectively allocated to NASD members. Moreover, the NASD believes that the level of the fee is reasonable because it relates to the recovery of the costs of supervising and regulating members.

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

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

Written comments were neither solicited nor received on the current proposal.

## 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 NASD consents, the Commission will:

- A. By order approve such proposed rule change, or

<sup>12</sup> Securities Exchange Act Release Nos. 46416 (Aug. 23, 2002), 67 FR 55901 (Aug. 30, 2002)(SR-NASD-2002-98) and 46417 (Aug. 23, 2002), 67 FR 55893 (Aug. 30, 2002)(SR-NASD-2002-99). The NASD also published three Notices to Members describing the proposed changes and addressing interpretive questions posed by NASD members. See Notice to Members 02-41 (July 2002), Notice to Members 02-63 (September 2002), and Notice to Members 02-75 (October 30, 2002).

<sup>13</sup> In its efforts to amend rule language to reflect its corporate restructuring, the NASD inadvertently added incorrect rule text. The correct rule language cited herein was effective upon filing in SR-NASD-99-43. See Securities Exchange Act Release No. 41937 (September 28, 1999), 64 FR 53762 (October 4, 1999).

<sup>14</sup> 15 U.S.C. 78s(b)(1).

<sup>15</sup> 15 U.S.C. 78o-3(b)(5).

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 NASD. All submissions should refer to file number SR-NASD-2002-148 and should be submitted by December 10, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46802; File No. SR-NYSE-2001-46]

### Self-Regulatory Organizations; Notice of Filing of 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

November 8, 2002.

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 October 29, 2001, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC")

the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On October 30, 2002, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On November 7, 2002, the Exchange submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

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 more efficient and effective, and to charge issuers a non-refundable appeal fee in the amount of \$20,000. Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in brackets.

\* \* \* \* \*

#### 804.00 Procedure for Delisting

- If the Exchange staff should determine that a security be removed from the list, it will so notify the issuer in writing, describing the basis for such decision and the specific policy or criterion under which such action is to be taken. The Exchange will simultaneously (1) issue a press release disclosing the company's status and basis for the Exchange's determination and (2) begin daily dissemination of ticker and information notices identifying the security's status, and include similar information on the Exchange's web site.

- The notice to the issuer shall also inform the issuer of its right to a review of the determination by a Committee of the Board of Directors of the Exchange (comprised of a majority of public Directors), provided a written request for such a review is filed with the Secretary of the Exchange within ten business days after receiving the

<sup>3</sup> See 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.

<sup>4</sup> See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division, Commission ("Amendment No. 2"). Amendment No. 2 makes a technical correction to the proposed rule change.

aforementioned notice. *Such written request must state with specificity the grounds on which the issuer intends to challenge the determination of the Exchange staff, must indicate whether the issuer desires to make an oral presentation to the Committee, and must be accompanied or preceded by payment of a non-refundable appeal fee in the amount of \$20,000.* [Such review will be conducted on the next monthly Review Day which is at least 25 business days from the date the request for review is filed with the Secretary of the Exchange. If the next Review Day is in less than 25 business days, the review will be scheduled for the following Review Day.]

- If the issuer does not request a review within the specified period, the Exchange shall suspend trading in the security and an application shall be submitted by the Exchange staff to the Securities and Exchange Commission to strike the security from listing and a copy of such application shall be furnished to the issuer in accordance with Section 12 of the Securities Exchange Act of 1934 and the rules promulgated thereunder.

- If a review is requested, the review will be [conducted by a Committee of the Board of Directors.] *scheduled for the first Review Day which is at least 25 business days from the date the request for review is filed with the Secretary of the Exchange, unless the next subsequent Review Day must be selected to accommodate the Committee's schedule. The Committee's review shall be based on oral argument (if any) and the written briefs and accompanying materials submitted by the parties. The company shall not be permitted to argue grounds for reversing the staff's decision that are not identified in its request for review, however, the company 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. This section shall not, however, (i) authorize a company to seek to file a reply brief in support of its request for review or (ii) be deemed to limit the 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*

<sup>16</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.