

Manual, are assessed separately on each class of security issued. Because some companies have more than one class of common stock listed on the NYSE, the NYSE currently provides that if one class pays the \$35,000 minimum fee, the other class(es) are subject to lower minima (ranging from \$16,170 to \$32,320) depending on the number of shares listed. To simplify this structure, the NYSE is proposing to amend Sections 902.02C and 902.04C of the NYSE Listed Company Manual so that when a company has multiple classes of common stock listed on the NYSE, the class with the greatest number of shares outstanding will be subject to the \$35,000 minimum, and each additional class of common stock will be subject to a minimum fee of \$20,000 per class.

Under Section 902.02C of the NYSE Listed Company Manual, classes of securities other than common stock are currently subject to the same continuing annual fee rate schedule as common stock, but with a lower minimum fee of \$3,600, rather than \$35,000. Accordingly, the NYSE proposes that the new rate schedule of \$930 per million shares will apply to these securities, and the applicable minimum will be raised from \$3,600 to \$5,000. In the case of a company with listed preferred stock that does not have common stock listed at the NYSE, the original listed preferred issue will be subject to the \$35,000 minimum annual fee, although other classes listed will be subject to the \$5,000 minimum.

Section 902.03B of the NYSE Listed Company Manual currently provides for a special set of "range minima" applicable to short-term securities, that subjects such issues to *higher* minimum continuing annual fees than are otherwise applied to non-common stock securities as described in the preceding paragraph. To eliminate this anomaly, the NYSE proposes to amend Section 902.03B of the NYSE Listed Company Manual to apply to such "short term securities" the new rate schedule of \$930 per million shares, and to also apply the same \$5,000 annual minimum as is applicable to other non-common stock securities.

Section 902.02C of the NYSE Listed Company Manual currently removes from the calculation of continuing annual fees any shares that have been listed for a period of 15 years or more. This policy results in companies having disparate continuing annual fees despite having a similar number of stocks listed on the NYSE. The NYSE proposes to eliminate this policy for all listed companies with the exception of closed-end funds.

Finally, the NYSE proposes to make permanent a \$1 million per-issuer fee cap that was implemented starting with the 2000 calendar year.⁸ That cap, codified in Section 902.02 of the NYSE Listed Company Manual, by its terms was put into effect on a pilot basis through calendar 2002. The NYSE believes that the cap avoids overburdening any particular company in an unusual year. Accordingly, the NYSE proposes to make the pilot permanent.

C. Amendment No. 1

In Amendment No. 1, the NYSE provided the Commission with copies of four letters from issuers responding to correspondence from the NYSE sent in early October that announced the NYSE's intention to implement the new fee schedule.⁹ A copy of one of those letters was submitted to the Commission as a comment letter responding to the proposed rule change.¹⁰ In general, the four letters criticized the magnitude of the percentage increase to which they would be subject, citing the down economy as a poor time to impose additional fees.

In responding to the concerns that the letters addressed, the NYSE suggested that those issuers who would be most adversely affected by the proposed rule change, would be those issuers affected by the discontinuance of the "15 year policy," which represents approximately 8% of the NYSE's list. The NYSE stated that it discontinued the 15-year policy because, in part, the policy resulted in disparate annual fees for companies with similar amounts of stock listed on the NYSE.

The NYSE also pointed out that it lengthened the phase-in period of the proposed fee schedule so that increases for any single issuer would be capped

at \$75,000 for calendar 2003, and at \$150,000 for calendar 2004. For a company hitting both those caps, the full impact of these price changes would not be borne until calendar 2005. The NYSE represented that this phase-in of the proposed rule change was designed to impose the fee increases in as fair a manner as possible.

III. Discussion

After careful review, the Commission finds that the proposed rule change, as amended is consistent with Section 6(b) of the Act¹¹ in general and furthers the objectives of Section 6(b)(4).¹² The Commission believes that the proposal is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its issuers.¹³

The Commission believes that the NYSE's proposed rule change should help to ensure that the NYSE will have adequate revenue to satisfy the increasing costs for operations, technology, regulation and infrastructure. The Commission notes that the NYSE will receive higher initial fees from equity issuers as a result of the proposed rule change, and that the NYSE believes that it will receive more revenue as a result of the modification to the continuing annual fee that it proposes. Moreover, the Commission believes that the proposed rule change should simplify the fee schedule for NYSE issuers. For example, the NYSE proposes to eliminate the tiered structure of Sections 902.02C,¹⁴ 902.03B and 902.04C of the NYSE Listed Company Manual (Continuing Annual Fees), whereby an issuer pays certain rates and is subject to particular minima, based upon the number of shares it lists on the NYSE. In its place, the NYSE proposes to impose a single per-share rate (\$930 per million shares), and a simplified minimum fee structure.

The Commission believes that the NYSE's proposal to make permanent the \$1 million per-issuer cap on listing fees in any given calendar year should help to ensure that a particular issuer will not be overburdened by listing fees in an unusual year.

The Commission believes that discontinuance of the "15-year policy,"

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4).

¹³ In approving this rule, the Commission notes that it has considered the proposal's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁴ The Commission notes that the NYSE proposes to maintain the tiered structure in Section 902.02C of the NYSE Listed Company Manual so that closed-end fund issuers continue to pay a variable continuing listing fee, based upon the number of shares they list on the NYSE.

⁸ See Securities Exchange Act Release No. 43163 (August 16, 2000), 65 FR 51389 (August 23, 2000) (SR-NYSE-00-16).

⁹ See letter from M. Michele Burns, Executive Vice President and Chief Financial Officer, Delta Air Lines, Inc. to Catherine R. Kinney, President and Co-Chief Operating Officer, NYSE, dated October 29, 2002, letter from Dennis J. Broderick, Senior Vice President, General Counsel and Secretary, Federated Department Stores, Inc. to Catherine R. Kinney, President and Co-Chief Operating Officer, NYSE, dated November 7, 2002, letter from Edward E. Thiele, Senior Vice President, Rowan Companies, Inc. to Catherine R. Kinney, President and Co-Chief Operating Officer, NYSE, dated November 14, 2002, and letter from Jeffrey C. Campbell, Senior Vice President and Chief Financial Officer, AMR Corporation to Catherine R. Kinney, President and Co-Chief Operating Officer, NYSE, dated December 2, 2002.

¹⁰ See letter from M. Michele Burns, Executive Vice President and Chief Financial Officer, Delta Air Lines, Inc. to Catherine R. Kinney, President and Co-Chief Operating Officer, NYSE, dated October 29, 2002, which the Commission received on December 26, 2002.