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

Margaret H. McFarland,

Deputy Secretary.

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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

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.

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.