

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

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

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.

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## 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.

<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).

<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).