

arguments concerning the foregoing. The Commission notes in particular that, under the proposal, the parties shall jointly bear the travel-related costs and expenses of the arbitrators appointed to hear the request for permanent injunctive relief. Further, the parties shall jointly bear the travel-related costs and expenses resulting from any subsequent hearings on damages or other relief. In addition, the parties shall equally pay the difference between the honorarium under proposed paragraph (b)(6)(C) of Rule 10335 and the amounts the arbitrators are otherwise entitled to receive under the Code. The arbitrators may not reallocate these costs and expenses among the parties. The Commission seeks comments on this fee structure, including whether the proposal is consistent with the Act which, among other things, prohibits the imposition of inappropriate and unnecessary burdens on competition<sup>6</sup> and requires that fees and charges be reasonable and equitably allocated.<sup>7</sup> In previous orders, the Commission has relied substantially on arbitrators' discretion in finding that fees and charges met this standard.<sup>8</sup>

Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 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 No. SR-NASD-00-02 and should be submitted April 28, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 00-8649 Filed 4-6-00; 8:45 am]

**BILLING CODE 8010-01-M**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42579; File No. SR-NYSE-99-50]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 thereto by the New York Stock Exchange, Inc. Relating to Continued Listing Standards

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 December 21, 1999, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. On March 27, 2000, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On March 27, 2000, 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 802 of its *Listed Company Manual* (the "Manual") regarding its criteria governing the continued listing of securities (and corresponding changes to NYSE Rule 499). Specifically, the Exchange proposes: (1) to define "market capitalization" for the purpose of its continued listing standards; (2) to clarify the appropriate measures for partnerships; and, (3) to

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> In Amendment No. 1, the NYSE made several clarifications to the intent and proposed interpretation of the proposed rule change. The Exchange expanded its discussion regarding the use of convertible securities in calculating the market capitalization of an issuer, and provided several examples of the proposed rule's application. The Exchange also explained the IRS-related basis for the proposed changes to the calculation of market capitalization for partnerships. Finally, the Exchange clarified that the proposed change to the bankruptcy provision would not restart the eighteen-month clock for an Exchange-approved plan. See Letter to Belinda Blaine, Associate Directors, Division of Market Regulation ("Division"), SEC, from James E. Buck, Senior Vice President and Secretary, NYSE, dated March 21, 2000 ("Amendment No. 1").

<sup>4</sup> In Amendment No. 2, the Exchange made several technical changes to the rule text which are reflected in this notice. See Letter to Belinda Blaine, Associate Director, Division, SEC, from James E. Buck, Senior Vice President and Secretary, NYSE, dated March 24, 2000 ("Amendment No. 2").

codify the Exchange's discretion to accept a financial plan for certain companies that have filed or that have announced an intent to file for bankruptcy, and that are below financial continued listing standards, but that are otherwise financially sound. The text of the proposed rule change is as follows: Proposed additions are italicized and proposed deletions are in brackets.

#### NYSE Listed Company Manual

\* \* \* \* \*

#### Section 8

##### Suspension and Delisting

##### 801.00 Policy

\* \* \* \* \*

##### 802.00 Continued Listing

##### 802.01 Continued Listing Criteria

\* \* \* \* \*

The Exchange would normally give consideration to delisting a security of either a domestic or non-U.S. issuer when:

\* \* \* \* \*

##### 802.01B Numerical Criteria for Capital or Common Stock—

If a company falls below any of the following criteria, it is subject to the procedures outlined in Paras. 802.02 and 802.03:

- Total global market capitalization is less than \$50,000,000 and total stockholders' equity *or, for partnerships, both the general and limited partners' capital as applicable*, is less than \$50,000,000 (C); or

- Average global market capitalization over a consecutive 30 trading-day period is less than \$15,000,000; or

- For companies that qualify under the "global market capitalization" standard:

- Total global market capitalization is less than \$500,000,000 and total revenues are less than \$50,000,000 over the last 12 months (unless the resultant entity qualifies as an original listing under one of the other standards) (C)

OR

- Average global market capitalization over a consecutive 30 trading-day period is less than \$100,000,000.

*When applying the market capitalization test in any of the above three standards, the Exchange will generally look to the total common stock outstanding (excluding treasury shares) as well as any common stock that would be issued upon conversion of another outstanding equity security. The Exchange deems these securities to be reflected in market value to such an extent that the security is a "substantial equivalent" of common stock. In this regard, the Exchange will only consider*

<sup>6</sup> See 15 U.S.C. 78o-3(b)(9).

<sup>7</sup> See 15 U.S.C. 78o-3(b)(5).

<sup>8</sup> See, e.g., Securities Exchange Act Release No. 41056 (February 16, 1999), 64 FR 10041 (March 1, 1999).

<sup>9</sup> 17 CFR 200.30-3(a)(12).

securities (1) Publicly traded (or quoted), or (2) Convertible into a publicly traded (or quoted) security. For partnerships, the Exchange will analyze the creation of the current capital structure to determine whether it is appropriate to include other publicly-traded securities in the calculation.

\* \* \* \* \*

#### 802.01D. Other Criteria—

If any of the following factors apply to a listed company, the Exchange may in its sole discretion subject the company to the procedures outlined in Paras. 802.02 and 802.03:

\* \* \* \* \*

#### Bankruptcy and/or Liquidation—

An intent to file under any of the sections of the bankruptcy law has been announced or a filing has been made or liquidation has been authorized and the company is committed to proceed. If a company files or announces an intent to file for reorganization relief under the bankruptcy laws (or an equivalent foreign law), the Exchange may exercise its discretion to continue the listing and trading of the securities of the company. However, if a company that is below any continued listing standard enumerated in Para. 802.10B above (which may be determined on the basis of price indications) files or announces an intent to file for relief under any provisions of any bankruptcy laws, it is subject to immediate suspension and delisting. Similarly, if a company that files or announces an intent to file for relief under any provisions of any bankruptcy laws subsequently falls below any continued listing standard enumerated in Para. 802.10B above (which may be determined on the basis of price indications), it is subject to immediate suspension and delisting. *Notwithstanding the foregoing, in the event that such a company is profitable (or has positive cash flow), or is demonstrably in sound financial health despite the bankruptcy proceedings, the Exchange may evaluate and accept a Plan submitted under the procedures of 802.02 and 802.03.*

\* \* \* \* \*

#### NYSE Rules

##### Delisting of Securities

##### Suspension from Dealings or Removal from List by Action of the Exchange

The aim of the New York Stock Exchange is to provide the foremost auction market for securities of well-established companies in which there is a broad public interest and ownership.

#### Rule 499.

\* \* \* \* \*

**.20 NUMERICAL AND OTHER CRITERIA.**—WHEN A COMPANY FALLS BELOW ANY OF THESE CRITERIA, THE EXCHANGE MAY GIVE CONSIDERATION TO ANY DEFINITIVE ACTION THAT A COMPANY WOULD PROPOSE TO TAKE THAT WOULD BRING IT ABOVE CONTINUED LISTING STANDARDS.

\* \* \* \* \*

4. \*Total global market capitalization is less than \$50,000,000 and total stockholders' equity or, for partnerships, both the general and limited partners' capital as applicable, is less than \$50,000,000. A company that is determined to be below this continued listing criteria must re-establish both its market capitalization and its stockholders' equity (or net assets for Funds) to be considered in conformity with continued listing standards pursuant to [Paras. 802.02 and 802.03] Sections .50 and .60.

5. \*Average global market capitalization over a consecutive three-month period is less than \$15,000,000.

6. \*For companies that qualify under the "global market capitalization" standard:

- Total global market capitalization is less than \$500,000,000 and total revenues are less than \$50,000,000 over the past 12 months. A company that is determined to be below this continued listing criteria must re-establish both its market capitalization and its revenues to be considered in conformity with continued listing standards pursuant to [Paras. 802.02 and 802.03] Sections .50 and .60.

OR

- Average global market capitalization over a consecutive 30 trading-day period is less than \$100,000,000.

*\*When applying the market capitalization test, the Exchange will generally look to the total common stock outstanding (excluding treasury shares) as well as any common stock that would be issued upon conversion of another outstanding equity security. The Exchange deems these securities to be reflected in market value to such an extent that the security is a "substantial equivalent" of common stock. In this regard, the Exchange will only consider securities (1) publicly traded (or quoted), or (2) convertible into a publicly traded (or quoted) security. For partnerships, the Exchange will analyze the creation of the current capital structure to determine whether it is appropriate to include other publicly-traded securities in the calculation.*

\* \* \* \* \*

Bankruptcy and/or Liquidation.—An intent to file under any of the sections

of the bankruptcy law has been announced or a filing has been made or that liquidation has been authorized and the company is committed to proceed. If a company files or announces an intent to file for reorganization relief under the bankruptcy laws (or an equivalent foreign law), the Exchange may exercise its discretion to continue the listing and trading of the securities of the company. However, if a company that is below any continued listing standard enumerated in sections 4–6, above (which may be determined on the basis of price indications) files or announces an intent to file for relief under any provisions of any bankruptcy laws, it is subject to immediate suspension and delisting. Similarly, if a company that files or announces an intent to file for relief under any provisions of any bankruptcy laws subsequently falls below any continued listing standard enumerated in sections 4–6 above (which may be determined on the basis of price indications), it is subject to immediate suspension and delisting. *Notwithstanding the foregoing, in the event that such a company is profitable (or has positive cash flow), or is demonstrably in sound financial health despite the bankruptcy proceedings, the Exchange may evaluate and accept a Plan submitted under the procedures of Sections .50 and .60.*

#### 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 Exchange 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 Exchange 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

The purpose of this proposed rule change is to modify several of the Exchange's existing continued listing criteria. The Exchange recently revised its continued listing standards,<sup>5</sup> and to this point several issues have come to light that necessitate clarification. First,

<sup>5</sup> See Securities Exchange Act Release No. 42194 (December 1, 1999), 64 FR 69311 (December 10, 1999).

the Exchange proposes to define the term "market capitalization" in so far as it applies to the continued listing standards. Second, the Exchange proposes to clarify what is meant by "shareholders equity" in the context of partnerships. Third, the Exchange proposes to specify a set of circumstances in which it will exercise some discretion in determining the listing status of a company that has filed or has announced an intent to file for bankruptcy, and that is below the financial continued listing standards specified in Para. 802.01B of the Manual. These amendments are each discussed in detail below.

#### (A) Market Capitalization Definition

Two of the new standards focus on the issuer's market capitalization. During the implementation of these new standards, several issues have arisen as to whether securities other than traditional equity instruments are intended to be included in the definition of the term "market capitalization."

The Exchange evaluated the comments and suggestions put forth by many issuers and discussed the issue with several outside consultants. As a result of this process, the Exchange proposes to specify that for purposes of its continued listing standards, the term "market capitalization" will encompass all common stock outstanding, whether publicly traded or not, so long as the Exchange is able to accurately attribute a value to it<sup>6</sup> on the day the market capitalization is calculated. Thus, if such a security is publicly traded common stock, the closing price from the previous trading day will be the price used for purposes of the calculation.

In addition, the Exchange believes that it is appropriate to provide its staff with the discretion to evaluate the capital structure of the issuer and include common stock that would be issued upon conversion of an instrument that constitutes the issuer's capital. Traditional debt, related to financing activities, will be excluded. Similar to the procedure discussed above, but for convertible publicly-traded securities other than common stock, the applicable price will be the closing price of the common stock into which it is convertible from the previous trading day. For example, if a convertible preferred security trades at \$15 and the common stock into which

it is convertible trades at \$10, the price utilized would be the closing price of the common stock on the previous day (not the higher price of the preferred security) and the market capitalization would be computed on an as-converted basis.

Finally, if the issuer has outstanding privately-held securities, the calculation would be made as described above for convertible securities based upon the previous day's closing price of the publicly-traded security. Thus, a privately held Class B common stock convertible into the publicly-traded Class A would be valued at the price of the Class A. Likewise, a privately-held preferred Series A convertible into the publicly-traded Class A would be valued at the price of the Class A on an as-converted basis.

The Exchange notes that it will also review any applicable conversion restrictions when conducting its market capitalization analysis and factor any such restrictions into the computations as appropriate.

#### (B) "Shareholders' Equity" and Market Capitalization" of Partnerships.

Partnerships raise a unique set of issues that need to be incorporated into Exchange rules. Again, after consulting with various individuals, the Exchange proposes to create an additional provision in the market capitalization definition. The provision would enable the Exchange to evaluate the formation of the current capital structure of the partnership and, where appropriate, to include other publicly-traded securities in the calculation as a substantial equivalent to common stock.

Furthermore, the Exchange proposes to amend the stockholders' equity test to clarify that both general and limited partners' capital is the measure for the applicable calculation. The Exchange believes that this clarification is necessary because the concept of "shareholders' equity" is not applicable to partnerships. Instead, the notion of capital captures the appropriate analogous concept with respect to partnerships.

The Exchange's intent in codifying the concept of analyzing the creation of the current capital structure stems primarily from the recent expiration of an IRS grandfather provision that resulted in numerous recapitalizations of partnerships. The Exchange believes it is not equitable to penalize these partnerships for restructuring in order to prevent, among other things, double taxation. Thus, for instance, if a holder of \$50 of partnership units prior to the conversion were to receive \$25 in partnership units and \$25 in debt, the

"market value" of the holdings has not changed and should be calculated at \$50 for purposes of determining the continued listing status of the company. Consistent with the principles articulated above, the Exchange would require that the non-equity instrument be publicly traded so as to assure the ability to value the instrument.

#### (C) Companies That Have Filed for Bankruptcy and That Are Below the Financial Continued Listing Criteria

The recently approved language that addresses companies that have filed or that have announced an intent to file for bankruptcy, and that are also below the Exchange's financial continued listing criteria, requires the Exchange to subject such a company to "immediate suspension and delisting." There are instances, however, where the Exchange has found that such a company should be afforded the opportunity to submit a financial plan for evaluation. For instance, a company that is profitable (or that has a positive cash flow), or is demonstrably in sound financial health despite the bankruptcy proceedings, should not be delisted if it can demonstrate that, within 18 months, it will be in compliance with the Exchange's financial criteria. In response to these circumstances, the Exchange proposes to amend this provision to create the authority to analyze the financial status of these companies on a case-by-case basis. However, if a company has previously filed an Exchange-approved plan to meet the Exchange's continued listing standards within 18 months, application of this provision to the company does not restart the 18-month clock. Thus, for instance, a company that declares bankruptcy midstream through an Exchange-approved plan would still only have the remainder of the plan period to come into compliance. It would not be afforded an additional 18 months, but would incorporate the projected effect of the bankruptcy into its Plan and resubmit it for consideration.

#### 2. Statutory Basis

The Exchange believes the basis under the Act for the proposed rule change is the requirement under Section 6(b)(5)<sup>7</sup> that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and

<sup>6</sup> For example, a privately-held Class B common stock convertible into the listed Class A common stock would be included and valued on an as-converted basis.

<sup>7</sup> 15 U.S.C. 78f(b)(5).

open market and, in general, to protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

The Exchange has neither solicited nor received any written comments with respect to the proposed rule change.

#### **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 self-regulatory organization consents, the Commission will:

A. By order approve the proposed rule change, or

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, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-NYSE-99-50 and should be submitted by April 28, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 00-8487 Filed 4-6-00; 8:45 am]

BILLING CODE 8010-01-M

#### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-42604; File No. SR-NYSE-00-10]

#### **Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 by the New York Stock Exchange, Inc. Relating to Listed Company Fees**

March 31, 2000.

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 March 2, 2000, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On March 22, 2000, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and to grant accelerated approval to the proposed rule change and Amendment No. 1.

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

The Exchange proposes to amend Paragraph 902.02 of the Exchange's Listed Company Manual (the "Manual"). Paragraph 902.02 of the Manual contains the schedule of current listing fees for companies listing securities on the Exchange. The text of the proposed rule change is as follows. New text is *italicized*.

#### **902.02 Schedule of Current Listing Fees**

\* \* \* \* \*

<sup>8</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> In Amendment No. 1, the NYSE clarified its purpose for proposing the rule change. See letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Deborah Flynn, Division of Market Regulation ("Division"), SEC, dated March 21, 2000 ("Amendment No. 1").

#### **A. Original Listing Fee**

A special charge of \$36,800 in addition to initial fees (described below) is payable in connection with the original listing of a company's stock. *In any event, each issuer (excluding closed-end funds) is subject to a minimum original listing fee of \$150,000 inclusive of the special charge referenced in the preceding sentence.* The special charge is also applicable to an application which in the opinion of the Exchange is a "back-door listing". See Para. 703.08 (F) for definition.

\* \* \* \* \*

#### **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 Exchange 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 III below. The Exchange has prepared summaries, set forth 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**

The proposed rule change amends the listed company fee schedule, set forth in Paragraph 902.02 of the Manual, as it applies to original listing fees. The Exchange seeks to adopt a \$150,000 minimum original listing fee for each domestic new issuer (excluding closed-end funds). This minimum would include the existing special charge of \$36,800.<sup>4</sup>

By establishing this minimum fee, the Exchange is proposing to set a base fee that issuers (other than funds) will pay to the Exchange regardless of the number of shares listed by a particular company at the time of the original listing.<sup>5</sup> The Exchange represents that the intent of the proposed rule change is to modestly enhance the revenue received by the Exchange at the time of certain original listings, while providing for potential applicants and their advisers a clear statement of the minimum that must be paid at the time

<sup>4</sup> The Exchange currently charges a special charge of \$36,800 in addition to initial listing fees. See Paragraph 902.02 A of the Manual.

<sup>5</sup> See Amendment No. 1, *supra*, note 3.