

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>24</sup> that the proposed rule change (SR-NASD-2001-47), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>25</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47253; File No. SR-NYSE-2001-27]

### Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. Relating to Amendments to Section 804 of the Listed Company Manual and Rule 499 of the Exchange

January 24, 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 August 17, 2001, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") 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 NYSE. On January 22, 2003, the NYSE filed Amendment No. 1 to the proposed rule change with the Commission.<sup>3</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 NYSE proposes to amend Section 804 of the Listed Company Manual to specify that public directors will constitute a majority of the directors of

the Committee for Review voting on final delisting determinations. The NYSE also proposes to codify this change in the parallel Exchange Rule 499, as well as make other minor conforming changes.

The text of the proposal is below. Proposed new language is in italics; proposed deletions are in brackets.

\* \* \* \* \*

#### 804.0 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 *the members of such Committee voting on each determination must be 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 aforementioned notice.

\* \* \* \* \*

If a review is requested, the review will be 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 chairman of the Committee will disclose to the company and the staff at the commencement of the review which of the industry Directors present will be voting on the matter, although all directors will be entitled to participate in the discussion.* The Committee's review and final decision shall be based on oral argument (if any) and the written briefs and accompanying materials submitted by the parties.

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#### Delisting of Securities

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

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Rule 499. Securities admitted to the list may be suspended from dealings or removed from the list at any time.

\* \* \* Supplementary Material

\* \* \* \* \*

#### .70 Procedure for Delisting

a. 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 [appending a suffix to the security's ticker symbol identifying the security's status] *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 *the members of such Committee voting on each determination must be 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 aforementioned notice.

\* \* \* \* \*

c. If a review is requested, the review will be 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 chairman of the Committee will disclose to the company and the staff at the commencement of the review which of the industry Directors present will be voting on the matter, although all directors will be entitled to participate in the discussion.* The Committee's review and final decision shall be based on oral argument (if any) and the written briefs and accompanying materials submitted by the parties.

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#### 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 NYSE 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 NYSE has prepared summaries, set forth in

<sup>24</sup> 15 U.S.C. 78s(b)(2).

<sup>25</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 letter from Darla Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated January 17, 2003 ("Amendment No. 1"). In Amendment No. 1, the Exchange replaced its original proposal in its entirety. In part, the Exchange clarified its rotation system with respect to the industry directors voting on a particular matter, clarified the basis for a decision made by the Committee for Review, specified the quorum requirements for the Committee for Review, and made conforming changes to the Exchange's rule text.

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

Section 804 of the Listed Company Manual describes the procedures to be followed when the Exchange determines that a security should be removed from the list. It provides that the issuer has a right to request a review of the Exchange's determination by a Committee of the Board of Directors of the Exchange, and specifies that that committee is to be "comprised of a majority of public Directors." This requirement was added as part of a larger revision of these procedures that became effective in 2000.<sup>4</sup> The Exchange represents that the Committee for Review has long been the committee of the Board that has reviewed both disciplinary and delisting matters, and it has often been comprised of equal numbers of public and industry directors.<sup>5</sup> The Exchange represents that when the Exchange began to implement the new delisting review procedures in 2000, it became necessary to reconcile the Committee's traditional composition with the new requirement that delisting matters be reviewed by a committee comprised of a majority of public directors. The Exchange also wanted to ensure that non-voting industry directors were not precluded from participating in discussions regarding delisting determinations as a result of the new requirement. Consequently, the Committee required that the quorum for delisting matters be two public directors and one industry director, and established a rotation system<sup>6</sup> with respect to industry

director voting on delisting matters so that those voting are comprised of a majority of public directors and at least one industry director.

To insure that the Exchange's procedures are adequately described in the Listed Company Manual, the NYSE proposes to amend Section 804 of the Listed Company Manual to specify that public directors will constitute a majority of the directors voting on the delisting matter. The Exchange is also proposing to codify this change in the parallel Exchange Rule 499. Proposed NYSE Rule 499 also reflects a previous amendment to Section 804 of the Listed Company Manual that was inadvertently not added to NYSE Rule 499.

In addition, pursuant to the proposed rule change, the Chairman of the Committee would also be required to disclose to the issuer and the staff at the commencement of each delisting hearing which of the industry directors will be voting on the delisting matter. Furthermore, the decision relating to the delisting appeal would be required to identify by name which directors participated only and which directors voted on the matter. The written decision issued by the Committee would also be required to clearly state that, in reaching its decision, the Committee considered only the oral arguments, written briefs and accompanying materials presented by the parties at the time of the hearing.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of Section 6(b)(5),<sup>8</sup> in particular, because it is 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 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.

present at a Committee meeting, the next succeeding industry director(s) will vote. The rotation system is subject to the composition of the Committee, which varies at each meeting as described above, depending upon each director's availability. As is the case with other procedures of the Committee, the rotation system may also be changed from time to time.

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

<sup>8</sup> 15 U.S.C. 78f(b)(5).

*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 written comments on 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 NYSE 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, 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 NYSE. All submissions should refer to File No. SR-NYSE-2001-27 and should be submitted by February 24, 2003.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>4</sup> See Securities Exchange Act Release No. 42863 (May 30, 2000); 65 FR 36488 (June 8, 2000).

<sup>5</sup> The Exchange states that as is the composition of any other Board Committee, the composition of the Committee for Review is determined annually, based on availability and expertise of Board members.

<sup>6</sup> Pursuant to the rotation system, the Committee designates prior to each delisting hearing which industry director(s) shall vote. At all hearings, all public directors present shall vote. For example, at a Committee meeting attended by three (3) public directors and three (3) industry directors at which two delisting appeals are considered, all public directors present and industry directors 1 and 2 will vote on the first delisting matter and all public directors present and industry directors 3 and 1 will vote on the second delisting matter. If, on the Committee's next review date, the meeting is attended by two (2) public directors and three (3) industry directors and one delisting appeal is considered, all public directors present and industry director 2 will vote on the matter; industry directors 1 and 3 will not vote. If any of the industry directors designated to vote next is not

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