

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 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 NASD. All submissions should refer to file number SR-NASD-2002-148 and should be submitted by December 10, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46802; File No. SR-NYSE-2001-46]

#### Self-Regulatory Organizations; Notice of Filing of 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

November 8, 2002.

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 October 29, 2001, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC")

the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On October 30, 2002, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On November 7, 2002, 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 804 of the NYSE Listed Company Manual and NYSE Rule 499 to make the procedures for appealing delisting determinations more efficient and effective, and to charge issuers a non-refundable appeal fee in the amount of \$20,000. Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in brackets.

\* \* \* \* \*

#### 804.00 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 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

<sup>3</sup> See 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.

<sup>4</sup> See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division, Commission ("Amendment No. 2"). Amendment No. 2 makes a technical correction to the proposed rule change.

aforementioned notice. *Such written request must state with specificity the grounds on which the issuer intends to challenge the determination of the Exchange staff, must indicate whether the issuer desires to make an oral presentation to the Committee, and must be accompanied or preceded by payment of a non-refundable appeal fee in the amount of \$20,000.* [Such review will be conducted on the next monthly Review Day which is at least 25 business days from the date the request for review is filed with the Secretary of the Exchange. If the next Review Day is in less than 25 business days, the review will be scheduled for the following Review Day.]

- If the issuer does not request a review within the specified period, the Exchange shall suspend trading in the security and an application shall be submitted by the Exchange staff to the Securities and Exchange Commission to strike the security from listing and a copy of such application shall be furnished to the issuer in accordance with Section 12 of the Securities Exchange Act of 1934 and the rules promulgated thereunder.

- If a review is requested, the review will be [conducted by a Committee of the Board of Directors.] *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 Committee's review shall be based on oral argument (if any) and the written briefs and accompanying materials submitted by the parties. The company shall not be permitted to argue grounds for reversing the staff's decision that are not identified in its request for review, however, the company 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. This section shall not, however, (i) authorize a company to seek to file a reply brief in support of its request for review or (ii) be deemed to limit the 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*

<sup>16</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.

staff for further review. Should the Committee remand the matter to the staff, 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.

- A request for review will ordinarily stay the suspension of the subject security pending the review, but the Exchange staff may immediately suspend from trading any security pending review should it determine that such immediate suspension is necessary or appropriate in the public interest, for the protection of investors, or to promote just and equitable principles of trade.

- Promptly following receipt of a request for review and the appeal fee, the Exchange's Office of the General Counsel will notify the issuer and the Exchange staff of the scheduled Review Day and the briefing schedule. The schedule will be set by the Office of the General Counsel so as to provide the Committee adequate time to review materials submitted to it, with the remaining time split so as to afford the issuer and the Exchange staff substantially equal periods for the submission of a brief by the issuer and a responsive brief by the Exchange staff. [Any brief or memorandum dealing with the issuer's or the Exchange staff's position as well as any other written material which the aforementioned parties want the Committee to consider must be received by the Office of the General Counsel of the Exchange within 17 business days from the date the issuer receives the notice of its right to a review so that such material can be furnished to the members of the Committee.] Each party must [also serve such materials] submit its brief and any accompanying materials to [on] both its counterparty [simultaneously with the submission to] and to the Office of the General Counsel of the Exchange, and must do so by means calculated to ensure the party's submission reaches both the Office of the General Counsel and the counterparty at or prior to the deadline specified in the briefing schedule. [The counterparty service must be made in the same manner as such material is filed with the Office of the General Counsel of the Exchange.]

- The Committee, in its sole discretion upon written motion of either party or upon its own motion, may extend any of the time periods specified above. The Committee in its sole discretion [and] may permit the parties to make oral presentations on their

Review Day in accordance with such procedures as the Committee may specify at the time. If the Committee denies a request by either party to make an oral presentation, its reason for doing so must be included in its written decision on the review, which decision is provided to all parties. *Document discovery and depositions will not be permitted.*

- If the Committee decides that the security of the issuer should be removed from listing, the Exchange shall suspend trading in the security as soon as practicable and an application shall be submitted by the Exchange to the Securities and Exchange Commission to strike the security from listing and registration and a copy of such application shall be furnished to the issuer in accordance with Section 12 of the Securities Exchange Act of 1934 and the rules promulgated thereunder. If the Committee decides that the security should not be removed from listing, the issuer will receive from the Exchange a notice to that effect.

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#### Rule 499

##### Delisting of Securities

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

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##### \* \* \* 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. 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 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. *Such written request must state with specificity the grounds on which the issuer intends to challenge the determination of the Exchange staff, must indicate whether the issuer desires to make an oral presentation to the Committee, and must be accompanied or preceded by payment of a non-refundable appeal fee in the amount of \$20,000.* [Such review will be conducted on the next monthly

Review Day which is at least 25 business days from the date the request for review is filed with the Secretary of the Exchange. If the next Review Day is in less than 25 business days, the review will be scheduled for the following Review Day.]

b. If the issuer does not request a review within the specified period, the Exchange shall suspend trading in the security and an application shall be submitted by the Exchange staff to the Securities and Exchange Commission to strike the security from listing and a copy of such application shall be furnished to the issuer in accordance with Section 12 of the Securities Exchange Act of 1934 and the rules promulgated thereunder.

c. If a review is requested, the review will be [conducted by a Committee of the Board of Directors.] *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 Committee's review shall be based on oral argument (if any) and the written briefs and accompanying materials submitted by the parties. The company shall not be permitted to argue grounds for reversing the staff's decision that are not identified in its request for review, however, the company 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. This section shall not, however, (i) authorize a company to seek to file a reply brief in support of its request for review or (ii) be deemed to limit the 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 staff for further review. Should the Committee remand the matter to the staff, 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.*

A request for review *will* ordinarily stay the suspension of the subject security pending the review, but the Exchange staff may immediately suspend from trading any security pending review should it determine that such immediate suspension is necessary or appropriate in the public interest, for the protection of investors, or to promote just and equitable principles of trade.

d. *Promptly following receipt of a request for review and the appeal fee, the Exchange's Office of the General Counsel will notify the issuer and the Exchange staff of the scheduled Review Day and the briefing schedule. The schedule will be set by the Office of the General Counsel so as to provide the Committee adequate time to review materials submitted to it, with the remaining time split so as to afford the issuer and the Exchange staff substantially equal periods for the submission of a brief by the issuer and a responsive brief by the Exchange staff.* [Any brief or memorandum dealing with the issuer's or the Exchange staff's position as well as any other written material which the aforementioned parties want the Committee to consider must be received by the Office of the General Counsel of the Exchange within 17 business days from the date the issuer receives the notice of its right to a review so that such material can be furnished to the members of the Committee.] Each party must [also serve such materials] *submit its brief and any accompanying materials to [on]both its counterparty [simultaneously with the submission to]and to the Office of the General Counsel of the Exchange, and must do so by means calculated to ensure the party's submission reaches both the Office of the General Counsel and the counterparty at or prior to the deadline specified in the briefing schedule.* [The counterparty service must be made in the same manner as such material is filed with the Office of the General Counsel of the Exchange.]

e. The Committee, in its sole discretion upon written motion of either party or upon its own motion, may extend any of the time periods specified above. *The Committee in its sole discretion* [and] may permit the parties to make oral presentations on their Review Day in accordance with such procedures as the Committee may specify at the time. If the Committee denies a request by either party to make an oral presentation, its reason for doing so must be included in its written decision on the review, which decision is provided to all parties. *Document discovery and depositions will not be permitted.*

f. If the Committee decides that the security of the issuer should be removed from listing, the Exchange shall suspend trading in the security as soon as practicable and an application shall be submitted by the Exchange to the Securities and Exchange Commission to strike the security from listing and registration and a copy of such application shall be furnished to the issuer in accordance with section 12 of the Securities Exchange Act of 1934 and the rules promulgated thereunder. If the Committee decides that the security should not be removed from listing, the issuer will receive from the Exchange a notice to that effect.

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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 Exchange included statements concerning the purpose of, and basis for, 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

Section 804 of the NYSE *Listed Company Manual* and NYSE Rule 499 describe the procedures to be followed when the Exchange determines that a security should be removed from listing with the Exchange. They provide that the issuer has a right to request a review of the Exchange's determination by a committee of the Exchange's Board of Directors ("Committee For Review" or "Committee"), and contains the procedures to be followed in connection with such an appeal. In 2000, the SEC approved certain changes in the appeal procedures to allow companies to continue to trade on the Exchange during the appeal process, and set certain time parameters intended to ensure that appeals for delisting determinations are handled expeditiously by the Exchange.<sup>5</sup> After more than a year's experience under the new procedures, the Exchange believes that certain changes are needed to make

the process more efficient and effective, for both issuers and the Committee.

Under the current procedures, both the issuer and the Exchange staff are required to file their appeal briefs at the same time. In contrast, the Exchange asserts that most court procedures call for the appellant to submit its brief first. This allows the respondent to focus on the arguments advanced by the appellant, rather than having to speculate on what issues the appellant will raise. 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 will submit its written brief first, including any accompanying materials, with the Exchange permitted to respond. 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.

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,<sup>6</sup> and can establish a briefing schedule that takes account of both the Committee's caseload and the complexities of the specific case. 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. To cover other procedural questions, the Exchange proposes to specify in the procedures that document discovery and depositions are not permitted.

The Exchange also proposes to specify in its appeal procedures 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.<sup>7</sup> The

<sup>6</sup> The Committee For Review typically meets every two months.

<sup>7</sup> 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

Continued

<sup>5</sup> See Securities Exchange Act Release No. 42863 (May 30, 2000), 65 FR 36488 (June 8, 2000) (File No. SR-NYSE-99-30).

proposed rule changes states that the Committee for Review'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.

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. The Exchange believes that this historical approach, however, has to be considered in the context of the delisting and related appeal policies in effect at the time. According to the Exchange, changes in policies and procedures adopted or formalized in 1999 have resulted in a larger number of companies being delisted, compared to prior years.<sup>8</sup> More recently, the Exchange notes that the percentage of delistings that are appealed has significantly increased, a result the Exchange ascribes to the changes made to the appeal procedures in 2000, whereby a company that has appealed a delisting would likely be permitted to trade on the Exchange during the appeal process. In a 21-month period since the new appeal procedures were in effect, there were 18 appeals out of 114 delisting determinations. In contrast, during the previous 21 months, there were only 6 appeals out of 104 delisting determinations. In sum, there are now more potential appellants, and they are appealing at a greater rate. Finally,

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.

<sup>8</sup> For example, 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.

while difficult to evidence with statistics, the Exchange staff is also under the impression that the appeals since the rule change have been more zealously contended by the companies involved, compared with previous years.

The Exchange has elected to use outside counsel to represent the Exchange's Financial Compliance staff in these delisting appeals. During the 12 months ending December 31, 2001, the Exchange paid slightly in excess of \$300,000 in legal fees to cover 11 delisting appeals completed during that time, 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. The Exchange considers it only fair and appropriate that the companies incurring these added out of pocket costs defray these costs by paying the proposed \$20,000 appeal fee.

The Exchange does not believe that the appeal fee will deter companies from taking reasonable appeals. 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. For these reasons the Exchange believes that companies electing to appeal a delisting decision can bear, and should pay, the \$20,000 appeal fee that has been proposed.

## 2. Statutory Basis

The Exchange believes that the basis under the Act for this proposed rule change is the requirement under section 6(b)(5) 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 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 Exchange 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 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 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 Exchange consents, the Commission will:

A. By order approve such 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 Exchange. All submissions should refer to File No. SR-NYSE-2001-46 and should be submitted by December 10, 2002.

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

**Margaret H. McFarland,**  
Deputy Secretary.

[FR Doc. 02-29244 Filed 11-18-02; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46816; File No. SR-NYSE-2002-56]

### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the New York Stock Exchange, Inc., Relating to Arbitration

November 12, 2002.

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 October 30, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange"), filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange.<sup>3</sup> On November 8, 2002, the NYSE filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. For the reasons described below, the Commission is granting accelerated approval to the proposed rule change.

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

The Exchange hereby proposes to amend Rule 600 relating to arbitrations for a six-month pilot period. During this six-month pilot period, the amendment to Rule 600 will require industry parties in arbitration to waive application of the California arbitrator disclosure standards upon the request of customers that have waived the application. The amendment will also require industry parties in arbitration to waive application of the California arbitrator

disclosure standards upon the request of associated persons. Below is the text of the proposed rule change, as well as the text of two forms relating to the waiver procedures that the Exchange proposes to distribute pursuant to the terms of the proposed rule change. Proposed new language is *italicized*.

\* \* \* \* \*

#### New York Stock Exchange, Inc.

##### Constitution and Rules

\* \* \* \* \*

##### Arbitration

\* \* \* \* \*

##### Rule 600

*(g) This paragraph applies to the Ethics Standards for Neutral Arbitrators in Contractual Arbitrations promulgated by the Judicial Council of California (the "California Standards"), which, were they to have effect in connection with arbitrations conducted pursuant to this Code, would conflict with this Code.*

*In light of this conflict, the affected customer(s) or an associated person of a member or member organization who asserts a claim against the member or member organization with which she or he is associated may:*

- *Request the Director to appoint arbitrators and schedule a hearing outside California, or*
- *Waive the California Standards and request the Director to appoint arbitrators and schedule a hearing in California. A written waiver by a customer or associated person who asserts a claim against the member or member organization with which he or she is associated on a form provided by the Director of Arbitration under this Code shall also constitute and operate as a waiver for all other parties to the arbitration who are members, allied members, member organizations, and/or associated persons of a member or member organization.*

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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 Exchange included statements concerning the purpose of and basis for the proposed rule change.<sup>5</sup> The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in Sections A, B, and C below,

<sup>5</sup> The discussion in this section represents the NYSE's views on the situation in California and does not in any way represent a Commission position on this issue.

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 is intended to provide options to customers and associated persons in California whose claims in arbitration cannot proceed because of the state's adoption of a law, and the Ethics Standards for Neutral Arbitrators in Contractual Arbitration ("the California Standards") promulgated thereunder, that purport to apply to arbitrations conducted pursuant to Exchange rules. The California Standards, were they to have effect, would conflict with the Exchange's arbitration rules.

The proposed amendment to Rule 600 responds to the purported imposition of California state law on arbitrations conducted under the auspices of the Exchange and pursuant to a set of nationally-applied rules approved by the Commission. On July 1, 2002, as a result of the purported application to Exchange arbitrations and arbitrators of the California Standards, the Exchange suspended the appointment of arbitrators for cases pending in California. The Exchange, along with NASD Dispute Resolution, Inc. (the "NASD"), is seeking a judgment in the United States District Court for the Northern District of California declaring that the California Standards are preempted by the Act and the Federal Arbitration Act. The SEC has sought leave to appear as a friend of the court ("amicus curiae") in the litigation and has submitted a brief that argues that the California Standards are preempted by the Act and by the Federal Arbitration Act.<sup>6</sup>

Shortly after filing the declaratory judgment action, the Exchange began to offer customers the option to have their cases heard outside of California. This proposed amendment enables the Exchange to offer customers in California the additional option of having their cases heard in California if they choose to waive application of the California Standards.

In disputes between a customer and a member, allied member, member organization, and/or associated person

<sup>6</sup> See Brief of the Securities and Exchange Commission, Amicus Curiae, in Support of Plaintiffs' Motion for Declaratory Judgment, *NASD Dispute Resolution, Inc. and New York Stock Exchange, Inc. v. Judicial Council of California*, No. C 02 3486 SBA (N.D. Cal.). The brief is available on the SEC Web site at: <http://www.sec.gov/litigation/briefs/nasddispute.pdf>.

<sup>9</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> The Commission corrected a typographical error, and added a reference to define the duration of the proposed pilot period, to the description of the proposed rule change, with the consent of the Exchange. Telephone conversation between Robert S. Clemente, Director of Arbitration, NYSE, and Andrew Shipe, Special Counsel, Division of Market Regulation, Commission, (November 7, 2002).

<sup>4</sup> Amendment No. 1 made technical edits to the proposed rule text.