

eligibility against additional comprehensive criteria. The Commission notes that the proposal is not materially different from standards in place at other marketplaces; both the New York Stock Exchange, Inc. and The Nasdaq Stock Market, Inc. listing standards contain a variety of alternative qualifications standards, including standards based on measures of market capitalization, revenue and assets.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,⁸ that the proposed rule change (SR-Amex-2002-97) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁹

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47115; File No. SR-NYSE-2002-62]

Self-Regulatory Organizations; Order Granting Accelerated Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 to the Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Initial Fees and Continuing Annual Fees for Domestic and Non-U.S. Issuers, Technical Original Listing Fees, and Supplemental Listing Applications Fees

December 31, 2002.

I. Introduction

On November 20, 2002, the New York Stock Exchange, Inc. ("NYSE") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934¹ and Rule 19b-4 thereunder,² a proposed rule change to increase and simplify the continuing annual listing fee pricing for all listed companies (excluding closed-end funds), and to increase the fee for technical original listings and supplemental listing applications. The NYSE also proposes to make permanent an overall \$1 million per-issuer fee cap that has been in effect on a pilot basis and is scheduled to expire on December

31, 2002.³ Notice of the proposed rule change was published for comment in the **Federal Register** on December 16, 2002.⁴ On December 30, 2002, the NYSE filed Amendment No. 1 to the proposed rule change.⁵ This order approves the NYSE's proposed rule change on an accelerated basis, publishes notice of Amendment No. 1, and grants accelerated approval to Amendment No. 1.

II. Description

A. Background

As noted above, the proposed rule change would increase the fees the NYSE charges to issuers that are listed on the NYSE and simplify the fee schedule that provides for such fees. The NYSE proposes to make the fees effective as of January 1, 2003.

B. Changes to the Fee Schedule

The NYSE proposes to increase the "technical original" listing fee. Currently, Section 902.02B of the NYSE Listed Company Manual provides for a "reduced initial fee" of \$5,300 when a company makes a technical change in the nature of the company without substantively affecting the equity position or rights of its common shareholders. This fee, often referred to as a "technical original" listing fee, applies when, for example, a company changes its state of incorporation or reincorporates, forms a holding company which replaces the listed company, or does a reverse split. The NYSE proposes to increase this fee from \$5,300 to \$15,000.

Section 902.02B of the NYSE Listed Company Manual also specifies that the

minimum fee for the consideration of any listing application is \$1,500. When shares are being issued concurrently with the application, the company is charged the greatest of the per-share rate, this minimum fee, or the "technical original" listing fee described in the immediately preceding paragraph. The NYSE is proposing to increase the minimum initial fee from \$1,500 to \$2,500.

The NYSE proposes to amend Section 902.02C of the NYSE Listed Company Manual, which relates to the continuing annual listing fee.⁶ Continuing annual fees for each issuer are based on the number of its securities listed (including American Depositary Securities represented by American Depositary Receipts), and there is a schedule of per-share rates set forth in Section 902.02C (Section 902.04C for non-U.S. companies) of the NYSE Listed Company Manual. Currently, that schedule is tiered, with a per-share rate of \$1,650 per million shares for the first and second million shares, and a per-share rate of \$830 per million shares for additional shares beyond two million. Likewise, the minimum fee that an issuer pays to continue to be listed on the NYSE is subject to a tiered structure, whereby an issuer is subject to a variable annual fee minimum based upon the number of shares it lists. The NYSE is proposing to eliminate the tiers, so that the per-share rate will be \$930 per million shares subject to a minimum continuing annual fee of \$35,000, as provided for in Section 902.04C of the proposed rule change to the NYSE Listed Company Manual.

The impact of these proposed changes to the continuing annual fee as described below will be capped for each issuer at \$75,000 for calendar 2003, and at \$150,000 for calendar 2004.⁷ For a company hitting both those caps, the full impact of these price changes would not be borne until calendar year 2005.

Continuing annual fees, which are set forth in Section 902.02C and Section 902.04C of the NYSE Listed Company

³ See Securities Exchange Act Release No. 43163 (August 16, 2000), 65 FR 51389 (August 23, 2000) (SR-NYSE-00-16).

⁴ See Securities Exchange Act Release No. 46960 (December 6, 2002), 67 FR 77124 (December 16, 2002) (SR-NYSE-2002-62). The 15-day comment period expired on December 31, 2002.

⁵ See Letter from Darla Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated December 27, 2002 ("Amendment No. 1"). In Amendment No. 1, the NYSE requested that the Commission either approve the proposed rule change after thirty days following publication in the **Federal Register** with retroactive effectiveness to January 1, 2003, or find good cause pursuant to Section 19(b)(2) of the Act for approving the proposed rule change prior to the thirtieth day after publication in the **Federal Register**. In addition, the NYSE provided the Commission with copies of four letters from issuers responding to correspondence from the NYSE in early October that announced the NYSE's intention to implement the new fee schedule. (The Commission also received a copy of one of the letters following publication of the notice in the **Federal Register**.) Furthermore, the NYSE set forth its view as to why it believed the Commission had good cause to accelerate the effectiveness of the proposed rule change prior to the thirtieth day after publication of the notice in the **Federal Register**.

⁶ At this time, the NYSE is not proposing to change the continuing annual fees as applied to closed-end funds listed on the NYSE, which continue to be subject to the fee schedule currently in effect. The Commission notes, however, that the NYSE is in the process of developing a revised fee schedule for closed-end fund issuers. Telephone conversation between Annmarie Tierny, Senior Counsel, Office of General Counsel, NYSE and Tim Fox, Law Clerk, Division of Market Regulation, December 5, 2002. In addition, no changes are being proposed to the several specific pricing provisions provided in Section 902.02C for "fund families" with a number of funds listed on the NYSE.

⁷ The Commission notes that the NYSE communicated these fee caps to issuers in correspondence sent to the issuers dated in early October of 2002. See Amendment No. 1.

⁸ 15 U.S.C. 78s(b)(2).

⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Manual, are assessed separately on each class of security issued. Because some companies have more than one class of common stock listed on the NYSE, the NYSE currently provides that if one class pays the \$35,000 minimum fee, the other class(es) are subject to lower minima (ranging from \$16,170 to \$32,320) depending on the number of shares listed. To simplify this structure, the NYSE is proposing to amend Sections 902.02C and 902.04C of the NYSE Listed Company Manual so that when a company has multiple classes of common stock listed on the NYSE, the class with the greatest number of shares outstanding will be subject to the \$35,000 minimum, and each additional class of common stock will be subject to a minimum fee of \$20,000 per class.

Under Section 902.02C of the NYSE Listed Company Manual, classes of securities other than common stock are currently subject to the same continuing annual fee rate schedule as common stock, but with a lower minimum fee of \$3,600, rather than \$35,000. Accordingly, the NYSE proposes that the new rate schedule of \$930 per million shares will apply to these securities, and the applicable minimum will be raised from \$3,600 to \$5,000. In the case of a company with listed preferred stock that does not have common stock listed at the NYSE, the original listed preferred issue will be subject to the \$35,000 minimum annual fee, although other classes listed will be subject to the \$5,000 minimum.

Section 902.03B of the NYSE Listed Company Manual currently provides for a special set of "range minima" applicable to short-term securities, that subjects such issues to *higher* minimum continuing annual fees than are otherwise applied to non-common stock securities as described in the preceding paragraph. To eliminate this anomaly, the NYSE proposes to amend Section 902.03B of the NYSE Listed Company Manual to apply to such "short term securities" the new rate schedule of \$930 per million shares, and to also apply the same \$5,000 annual minimum as is applicable to other non-common stock securities.

Section 902.02C of the NYSE Listed Company Manual currently removes from the calculation of continuing annual fees any shares that have been listed for a period of 15 years or more. This policy results in companies having disparate continuing annual fees despite having a similar number of stocks listed on the NYSE. The NYSE proposes to eliminate this policy for all listed companies with the exception of closed-end funds.

Finally, the NYSE proposes to make permanent a \$1 million per-issuer fee cap that was implemented starting with the 2000 calendar year.⁸ That cap, codified in Section 902.02 of the NYSE Listed Company Manual, by its terms was put into effect on a pilot basis through calendar 2002. The NYSE believes that the cap avoids overburdening any particular company in an unusual year. Accordingly, the NYSE proposes to make the pilot permanent.

C. Amendment No. 1

In Amendment No. 1, the NYSE provided the Commission with copies of four letters from issuers responding to correspondence from the NYSE sent in early October that announced the NYSE's intention to implement the new fee schedule.⁹ A copy of one of those letters was submitted to the Commission as a comment letter responding to the proposed rule change.¹⁰ In general, the four letters criticized the magnitude of the percentage increase to which they would be subject, citing the down economy as a poor time to impose additional fees.

In responding to the concerns that the letters addressed, the NYSE suggested that those issuers who would be most adversely affected by the proposed rule change, would be those issuers affected by the discontinuance of the "15 year policy," which represents approximately 8% of the NYSE's list. The NYSE stated that it discontinued the 15-year policy because, in part, the policy resulted in disparate annual fees for companies with similar amounts of stock listed on the NYSE.

The NYSE also pointed out that it lengthened the phase-in period of the proposed fee schedule so that increases for any single issuer would be capped

at \$75,000 for calendar 2003, and at \$150,000 for calendar 2004. For a company hitting both those caps, the full impact of these price changes would not be borne until calendar 2005. The NYSE represented that this phase-in of the proposed rule change was designed to impose the fee increases in as fair a manner as possible.

III. Discussion

After careful review, the Commission finds that the proposed rule change, as amended is consistent with Section 6(b) of the Act¹¹ in general and furthers the objectives of Section 6(b)(4).¹² The Commission believes that the proposal is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its issuers.¹³

The Commission believes that the NYSE's proposed rule change should help to ensure that the NYSE will have adequate revenue to satisfy the increasing costs for operations, technology, regulation and infrastructure. The Commission notes that the NYSE will receive higher initial fees from equity issuers as a result of the proposed rule change, and that the NYSE believes that it will receive more revenue as a result of the modification to the continuing annual fee that it proposes. Moreover, the Commission believes that the proposed rule change should simplify the fee schedule for NYSE issuers. For example, the NYSE proposes to eliminate the tiered structure of Sections 902.02C,¹⁴ 902.03B and 902.04C of the NYSE Listed Company Manual (Continuing Annual Fees), whereby an issuer pays certain rates and is subject to particular minima, based upon the number of shares it lists on the NYSE. In its place, the NYSE proposes to impose a single per-share rate (\$930 per million shares), and a simplified minimum fee structure.

The Commission believes that the NYSE's proposal to make permanent the \$1 million per-issuer cap on listing fees in any given calendar year should help to ensure that a particular issuer will not be overburdened by listing fees in an unusual year.

The Commission believes that discontinuance of the "15-year policy,"

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4).

¹³ In approving this rule, the Commission notes that it has considered the proposal's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁴ The Commission notes that the NYSE proposes to maintain the tiered structure in Section 902.02C of the NYSE Listed Company Manual so that closed-end fund issuers continue to pay a variable continuing listing fee, based upon the number of shares they list on the NYSE.

⁸ See Securities Exchange Act Release No. 43163 (August 16, 2000), 65 FR 51389 (August 23, 2000) (SR-NYSE-00-16).

⁹ See letter from M. Michele Burns, Executive Vice President and Chief Financial Officer, Delta Air Lines, Inc. to Catherine R. Kinney, President and Co-Chief Operating Officer, NYSE, dated October 29, 2002, letter from Dennis J. Broderick, Senior Vice President, General Counsel and Secretary, Federated Department Stores, Inc. to Catherine R. Kinney, President and Co-Chief Operating Officer, NYSE, dated November 7, 2002, letter from Edward E. Thiele, Senior Vice President, Rowan Companies, Inc. to Catherine R. Kinney, President and Co-Chief Operating Officer, NYSE, dated November 14, 2002, and letter from Jeffrey C. Campbell, Senior Vice President and Chief Financial Officer, AMR Corporation to Catherine R. Kinney, President and Co-Chief Operating Officer, NYSE, dated December 2, 2002.

¹⁰ See letter from M. Michele Burns, Executive Vice President and Chief Financial Officer, Delta Air Lines, Inc. to Catherine R. Kinney, President and Co-Chief Operating Officer, NYSE, dated October 29, 2002, which the Commission received on December 26, 2002.

¹⁵ pursuant to which shares listed for a continuous period of 15 years or more were eliminated from the calculation of continuing annual fees, should eliminate disparities in annual fees for companies with similar amounts of stock listed on the NYSE. Moreover, the Commission notes the NYSE's belief that only a limited percentage of listed companies—8%—will be affected by the discontinuance of the 15-year policy. Finally, the Commission believes that the phase-in of the proposed fee schedule over a three-year period should mitigate the impact of the proposed fee schedule on issuers.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice in the **Federal Register**, and prior to the expiration of the public comment period, ending December 31, 2002.¹⁶ The Commission believes that good cause exists to justify accelerated effectiveness of the proposed rule change, in part, because the pilot program of Section 902.02 of the NYSE Listed Company Manual, which currently institutes the \$1 million per-issuer fee cap on a pilot basis is due to expire on December 31, 2002. In finding good cause to accelerate effectiveness on this basis, the Commission notes that the NYSE has represented to the Commission that the expiration of the pilot program at any time before the effective date of this proposed rule change could lead to significant operational and billing problems.¹⁷

Finally, the accelerated approval of the proposed rule change will enable the new fee schedule to be in effect on January 1, 2003, the date which the NYSE wishes to make the new fees applicable. Therefore, the Commission finds that granting accelerated approval to the proposed rule change, as amended, is appropriate and consistent with Section 19(b)(2) of the Act.¹⁸

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 1, including whether the proposed amendment 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-2002-62 and should be submitted by January 31, 2003.

V. Order Granting Accelerated Approval

The original rule proposal was published for public comment on December 16, 2002.¹⁹ The NYSE submitted Amendment No. 1 to the proposed rule on December 30, 2002 in order to respond to four letters, which it had received prior to the filing of the proposed rule change, in which four issuers expressed their views opposing the proposed increase in listing fees.²⁰ For the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder. Moreover, the Commission finds that there is good cause to grant accelerated approval to the proposed rule change and Amendment No. 1, thereto.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²¹ that the proposed rule change and Amendment No. 1 thereto (SR-NYSE-2002-62) are approved on an accelerated basis.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.²²

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47124; File No. SR-Phlx-2002-84]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Off-Floor Trader Fees

January 3, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act"),¹ and rule 19b-4 thereunder,² notice is hereby given that on December 18, 2002, the Philadelphia Stock Exchange, Inc. ("Phlx" 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. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend its schedule of dues, fees and charges to require: (1) Future off-floor traders to pay an initial registration fee of \$100, an increase from \$50; and (2) current and future off-floor traders registered as of April 1 of each year to pay an annual fee of \$350, an increase from \$250. An off-floor trader is a person who is compensated directly or indirectly by a member or participant organization for which the Exchange is the Designated Examination Authority ("DEA") for the solicitation or handling of business in securities, including trading securities for the account of the member or participant organization, and who is not otherwise required to register with the Exchange.³ The proposed increase in the initial registration fee is to become effective January 2, 2003, with the increased annual fee to be implemented April 1, 2003.⁴ The text of the proposed rule change is available at the principal

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Off-floor traders are required to file the Uniform Application for Securities Industry Registration or Transfer form ("form U-4") with the Exchange. See Phlx rule 604(e)(i).

⁴ The Exchange has not designated the Off-Floor Trader Registration Fee as eligible for the monthly credit. See Securities Exchange Act Release No. 44292 (May 11, 2001), 66 FR 27715 (May 18, 2001) (SR-Phlx-2001-49). The monthly credit allows Exchange members to receive a monthly credit of up to \$1,000 to be applied against certain fees, dues, charges and other such amounts.

¹⁵ The Commission notes that the NYSE proposes to maintain the 15 year policy in Section 902.02C of the NYSE Listed Company Manual for closed-end fund issuers.

¹⁶ The Commission notes that it had received one letter regarding the proposed rule change as of the close of business, December 31, 2002. See note 10, *supra*.

¹⁷ See Item 7, Amendment No. 1.

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ See Securities Exchange Act Release No. 46960 (December 6, 2002), 67 FR 77124 (December 16, 2002) (SR-NYSE-2002-62).

²⁰ In Amendment No. 1, the NYSE also requested accelerated approval and articulated its view as to why the Commission should find good cause to accelerate the effectiveness of the proposed rule change.

²¹ 15 U.S.C. 78s(b)(2).

²² 17 CFR 200.30-3(a)(12).