floor brokers and specialists trading listed securities.

The proposal also increases the monthly caps on transaction fees on orders sent through the Exchange's MAX® system, adds a new access charge for firms that send orders through the Exchange's MAX system and adds a new processing fee for certain transactions in OTC securities. The new access charge will apply to firms that send orders from outside the Exchange to the Exchange's MAX system and is designed to help defray the costs of maintaining system access. The new processing fee will apply to transactions by CHX floor brokers in OTC securities, when those securities are not traded by a CHX specialist, but where the floor broker transactions are processed by the Exchange's clearing systems.

Finally, this proposal revises references to certain Nasdaq charges and makes other clarifying changes. Specifically, the proposal updates references to Nasdaq's Tools of the Trade product to confirm that this product is now offered directly through Nasdaq and confirms that each of the Exchange's monthly transaction fee caps apply separately to different types of transaction charges.

The Exchange has proposed these fee changes in connection with the development of its 2003 operating budget and believes that these changes appropriately and equitably allocate among Exchange members the costs associated with providing various Exchange services and the overall costs associated with operating the Exchange. All of these changes to the Exchange's Schedule of Membership Dues and Fees are effective as of January 1, 2003.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act[6] in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members.

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

The CHX does not believe that the proposed rule change will impose any inappropriate burden on competition.

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

No written comments were either solicited or received.

[6] 15 U.S.C. 78(f)(b)(4).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change establishes or changes a member due, fee or other charge, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[7] and subparagraph (f)(2) of Rule 19b–4[8] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[9]

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 CHX. All submissions should refer to File No. SR–CHX–2002–38 and should be submitted by February 7, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–1102 Filed 1–16–03; 8:45 am]

BILLING CODE 8010–01–P

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 240.19b–4(f)(2).

[9] 15 U.S.C. 78s(b)(3)(C).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47176; File No. SR–NASD–2003–01]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc., Relating to Refunds of Member Surcharges in Arbitration

January 13, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, (''Act'')[1] and rule 19b–4 thereunder,[2] notice is hereby given that on January 2, 2003 the National Association of Securities Dealers, Inc. (''NASD''), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. (''NASD Dispute Resolution'') 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 NASD. 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 NASD is proposing to amend rule 10333(a) of the NASD Code of Arbitration Procedure to provide that, in certain circumstances, NASD will refund the member surcharge paid by a member firm named as a party to an arbitration proceeding (or where its employee/former employee has been named as a party). Below is the text of the proposed rule change. Proposed new language is in *italics*; proposed deletions are in [brackets].

* * * * *

Code of Arbitration Procedure

* * * * *

10333. Member Surcharge and Process Fees

(a) Member Surcharge

(1) Each member that is named as a party to an arbitration proceeding, whether in a Claim, Counterclaim, Cross-Claim or Third-Party Claim, shall be assessed a [non-refundable] surcharge pursuant to the schedule below when the Director of Arbitration perfects service of the claim naming the member on any party to the proceeding.

(2) For each associated person who is named, the surcharge shall be assessed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

against the member or members that employed the associated person at the time of the events which gave rise to the dispute, claim or controversy. No member shall be assessed more than a single surcharge in any arbitration proceeding.

(3) The surcharge shall not be chargeable to any other party under Rules 10332(c) and 10205(c) of the Code. *The Director will refund the surcharge paid by a member in an arbitration filed by a customer if the arbitration panel: (A) denies all of the customer's claims against the member or associated person; and (B) allocates all forum fees assessed pursuant to Rule 10332(c) against the customer. The Director may also refund or cancel the member surcharge in extraordinary circumstances.*

(Remainder of rule unchanged.)

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD 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. NASD 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

Rule 10332(c) of the Code requires that the arbitrators, in their awards, shall determine the amount chargeable to the parties as forum fees and shall determine who shall pay such forum fees. Generally such fees are divided among the parties, but the arbitrators may, in their discretion, allocate all forum fees against the claimant or the respondent.

Rule 10333(a) of the Code requires that each member that is named as a party in an arbitration, or that employed an associated person who is named as a party at the time of the events that gave rise to the dispute, must pay a surcharge. The amount of the surcharge is based on the amount asserted by the claimant to be in dispute. The member surcharge is non-refundable and, unlike forum fees, may not be allocated among the other parties, regardless of the outcome of the arbitration. As a result, member firms must pay the surcharge, which is typically higher than filing fees or forum fees, even when the arbitrators deny a customer's claim and allocate all forum fees against the customer.

To mitigate the impact of arbitration fees on member firms in such cases, NASD is amending rule 10333(a) to provide that it will refund the member surcharge paid by each member firm named as a party (or where its employee/former employee has been named as a party) in an arbitration filed by a customer in which the arbitration panel: (1) Denies all of the customer's claims; *and* (2) allocates all of the forum fees against the customer. In cases with more than one customer claimant, NASD will not refund the surcharge unless the arbitration panel denies all of the customers' claims and allocates all of the forum fees against one or more of the customer claimants.

In addition, from time to time, the NASD states that a refund of the member surcharge may be warranted in extraordinary circumstances that do not meet the criteria described above. As an example, the NASD states that occasionally a customer mistakenly names a member firm as a respondent, and later withdraws the claim as to that particular member firm. The Code as currently written would prohibit any refund or cancellation of the surcharge in such a case. To give NASD more flexibility in addressing such cases, NASD is further amending rule 10333(a) to provide that the Director of Dispute Resolution, in his or her discretion, may cancel or refund member surcharges in extraordinary circumstances when he or she determines that retention of the surcharge would be inappropriate.[3]

This rule change applies only to member surcharges under rule 10333(a) and does not affect any other fee required under the Code. The rule change will apply to all claims filed on or after January 13, 2003.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,[4] which requires, among other things, that the Association's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the rule change will enhance the fairness of the NASD arbitration forum for member firms, particularly small member firms.

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

NASD 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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has been filed by NASD as establishing or changing a due, fee, or other charge imposed by the self-regulatory organization. Consequently, it has become effective pursuant to section 19(b)(3)(A) of the Act[5] and paragraph (f)(2) of rule 19b–4 thereunder.[6] At any time within 60 days of this filing, the Commission may summarily abrogate this proposal if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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

[3] NASD has represented to Commission staff that they will monitor the effect of the refund of the member surcharge on NASD Dispute Resolution's operating budget. Also, if NASD raises customer arbitration fees in the future, NASD will reinstate this member surcharge. Telephone conversation between Laura Gansler, Counsel, NASD Dispute Resolution, and Florence Harmon, Senior Special Counsel, Division of Market Regulation, Commission, January 10, 2003.

[4] 15 U.S.C. 78o–3(b)(6).

[5] 15 U.S.C. 78s(b)(3)(A)(ii).

[6] 17 CFR 240.19b–4(f)(6).

available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2003–01 and should be submitted by February 7, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–1111 Filed 1–16–03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47161; File No. SR–NYSE–2001–46]

Self-Regulatory Organizations; Order Approving 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

January 10, 2003.

On October 29, 2001, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to modify the Exchange's procedures for issuer appeals of delisting determinations, and to institute a non-refundable appeal fee. On October 30, 2002, the Exchange submitted Amendment No. 1 to the proposed rule change.[3] On November 7, 2002, the Exchange submitted Amendment No. 2 to the proposed rule change.[4] The proposed rule change, as amended, was published in the **Federal Register** on November 19, 2002.[5] No comments were received on the proposed rule change. This order approves the proposed rule change, as amended.

I. Description of the Proposal

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, in its view, more efficient and effective, and to charge issuers a non-refundable appeal fee in the amount of $20,000.

Under the current procedures, both the issuer and the Exchange staff are required to file their appeal briefs at the same time. 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 must submit its written brief first, including any accompanying materials. The Exchange will be permitted to respond to the issuer's brief. The proposal further states that the issuer and the Exchange will be given substantially equal periods for the submission of their briefs. 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.[6]

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.[7] The Exchange will state that document discovery and depositions are not permitted. The Exchange's proposed rules also provide the scope of the Committee's review of appeals, including 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.[8]

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. However, in its filing, the Exchange noted that changes in policies and procedures adopted or formalized by the Exchange in recent years have resulted in a significant increase of issuers that are delisted.[9] During the 12 months ending December 31, 2001, the Exchange represented that it paid slightly in excess of $300,000 in legal fees to cover 11 delisting appeals completed during that time,[10] 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. According to the Exchange, it is only fair and appropriate that the

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 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.

[4] Letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division, Commission, dated November 7, 2002 (''Amendment No. 2''). Amendment No. 2 makes a minor technical correction to the proposed rule change.

[5] Securities Exchange Act Release No. 46802 (November 8, 2002), 67 FR 69789.

[6] 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, and can establish a briefing schedule that takes account of both the Committee's caseload and the complexities of the specific case. The Exchange represents that the Committee For Review typically meets every two months.

[7] The Exchange represented that the Committee'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.

[8] 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 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.

[9] The Exchange believes this increase is a result of changes in appeal procedures whereby a company that has appealed a delisting likely will be permitted to trade on the NYSE while the appeal is pending. *See* Securities Exchange Act Release No. 42863 (May 30, 2000), 65 FR 36488 (June 8, 2000). As an example, the Exchange noted that 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. Regarding appeals, in a 21-month period since new appeal procedures were in effect in 2000, there were 18 appeals out of 114 delisting determinations. In contrast, during a previous 21-month period, there were only 6 appeals out of 104 delisting determinations.

[10] The Exchange has elected to use outside counsel to represent the Exchange's Financial Compliance staff in delisting appeals.