

waivers. Specifically, the proposal would allow a Nasdaq issuer that completed a merger with another Nasdaq issuer during the first 90 days of 2003 to apply for and receive a waiver for 75% of the annual fees assessed to the acquired Nasdaq issuer.<sup>3</sup> The proposed rule change was published for comment in the **Federal Register** on February 5, 2004.<sup>4</sup> The Commission received no comments on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association<sup>5</sup> and, in particular, the requirements of section 15A of the Act<sup>6</sup> and the rules and regulations thereunder. The Commission finds specifically that the proposal is consistent with the requirements of section 15A(b)(5) of the Act,<sup>7</sup> because it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that NASD operates or controls. Nasdaq has represented that it is proposing to take this action because it believes that is equitable to provide a partial credit for annual listing fees in order to avoid the assessment of two fees where a merger has occurred within the first 90 days of a given billing year. Further, Nasdaq has already implemented the same fee waiver on a going-forward basis.<sup>8</sup> The Commission believes that the proposed fee waiver should assist in reducing costs incurred by Nasdaq issuers that completed a merger with another Nasdaq issuer during the first 90 days of 2003.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act<sup>9</sup>, that the proposed rule change (File No. SR-NASD-2003-199) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34-49402; File No. SR-NYSE-99-12]**

### **Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval of Proposed Rule Change and Amendments No. 1 and 2 To Amend Exchange Rule 350 ("Compensation or Gratuities to Employees of Others")**

March 11, 2004.

On March 26, 1999, 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")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend Exchange Rule 350 ("Compensation or Gratuities to Employees of Others"). On February 5, 2003, The Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> On December 17, 2003, the Exchange filed Amendment No. 2 to the proposed rule change.<sup>4</sup>

The proposed rule change was published for comment in the **Federal Register** on January 23, 2004.<sup>5</sup> The Commission received no comments on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities

exchange<sup>6</sup> and, in particular, the requirements of section 6 of the Act<sup>7</sup> and the rules and regulations thereunder. In particular, the Commission believes that the proposed rule change is consistent with section 6(b)(5)<sup>8</sup> of the Act because by eliminating the requirement for the NYSE to approve compensation arrangements that have already been approved by a member or member organization that must supervise its employees, and clarifying the requirement to register when a floor employee receives more than \$200 a year from a member or member organization, the proposed rule should permit the NYSE to better allocate its resources, enabling the Exchange to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,<sup>9</sup> that the proposed rule change (SR-NYSE-99-12), including Amendment No. 1 and Amendment No. 2 be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>3</sup> The Commission notes that Nasdaq also submitted a separate proposed rule change, pursuant to section 19b(3)(A) of the Act, 15 U.S.C. 78s(b)(3)(A), to apply the same listing fee waiver on a going-forward basis. See Securities Exchange Act Release No. 49133 (January 28, 2004), 69 FR 5630 (February 5, 2004) (File No. SR-NASD-2003-198).

<sup>4</sup> See Securities Exchange Act Release No. 49134 (January 28, 2004), 69 FR 5631.

<sup>5</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>6</sup> 15 U.S.C. 78o-3.

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

<sup>8</sup> See *supra* note 3.

<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</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 C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated February 3, 2003 ("Amendment No. 1").

<sup>4</sup> See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division, Commission, dated December 16, 2004 ("Amendment No. 2").

<sup>5</sup> See Securities Exchange Act Release No. 49093 (January 16, 2004), 69 FR 03418. The proposal eliminates the requirement in Rule 350 that the NYSE approve certain compensation arrangements involving floor employees. It also codifies the requirement that a floor employee who receives more than \$200 per year for his services be employed by and registered with the member or member organization that provides the compensation.

<sup>6</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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

<sup>8</sup> 15 U.S.C. 78f(b)(6).

<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</sup> 17 CFR 200.30-3(a)(12).