UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of:

The Application of TREEHOUSE REAL ESTATE INVESTMENT TRUST,

For Review of Action Taken by New York Stock Exchange

Admin. Proc. File. No. 3-19192.

ADDITIONAL BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW OF ACTION BY THE NEW YORK STOCK EXCHANGE

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This brief is submitted in response to the Commission's January 3, 2020 Order Requesting Additional Briefs and directing the New York Stock Exchange (the "NYSE or the "Exchange") to address specific additional matters in relation to the appeal to the Commission by Treehouse Real Estate Investment Trust ("Treehouse" or the "Company") of the NYSE's decision to decline to accept an initial listing application from Treehouse.

The NYSE staff clearly notified counsel to Treehouse of its decision and gave the Company an opportunity to be heard on the specific grounds for the denial of listing. On March 31, 2019, Treehouse provided to the Exchange a detailed memorandum in which it addressed areas of concern with Treehouse's business model, anticipating the very concerns underlying the Exchange's subsequent decision not to list the Company. R.000001 - 000028.[1] After receipt of this memorandum, NYSE staff had two separate telephone meetings with counsel to Treehouse on April 30, 2019, and May 9, 2019, in which the issues with Treehouse's potential listing application were discussed at length. During those telephone meetings, the NYSE staff discussed the specific grounds for the decision not to accept a listing application from Treehouse: (i) the Company's sole disclosed business plan was to lease facilities to entities which were engaged in the production of cannabis products in the United States, (ii) the activities of Treehouse's counterparties in the leased facilities would clearly be in violation of U.S. federal criminal law, and (iii) the NYSE was concerned that Treehouse's own actions in leasing real estate for such purposes might subject Treehouse itself to criminal liability. Further, the NYSE staff then agreed to a request from the Company's counsel to have an additional in-person meeting with Treehouse management to enable them to further advocate for their proposed

[1] Citations to the appeal record begin with "R." followed by the page numbers of the record cited.

listing. However, counsel for Treehouse subsequently sent an email to NYSE staff withdrawing this request, thereby declining a further opportunity to be heard in this matter. R.000035.

The approach the Exchange followed in reviewing Treehouse's proposed listing was consistent with its process as set forth in Section 104.00 of the NYSE Listed Company Manual, which reads as follows:

> The Exchange will undertake a free confidential review of the eligibility for listing of any company that requests such a review and provides the documents listed in Section 104.01 (for domestic companies) or Section 104.02 (for non-U.S. companies). A company may submit an original listing application only after it has been cleared to do so by the Exchange after completion of a free confidential eligibility review.

As the Exchange decided not to clear Treehouse to submit a listing application, the Company never submitted a formal application. Section 104.00 does not specify the form in which the Exchange's decision not to clear a potential applicant must be communicated to that applicant. Accordingly, because NYSE rules do not require it to convey determinations in a formal letter, the NYSE does not as a matter of practice do so (and did not do so here). Importantly, the record shows that Treehouse was, in fact, notified of the Exchange's decision. R.000035.

Exchange rules also do not provide for an appeal within the Exchange of a determination under Section 104.00 not to clear a company to submit an application. Exchange rules have never provided such a right of appeal and, in 2013, the Commission approved an Exchange proposed rule change, including the current text of Section 104.00, finding it consistent with the Securities Exchange Act of 1934 (the "Act"), notwithstanding the absence of an internal appeal

right for companies who were not cleared to submit an application after the confidential eligibility review.[2]

This 2013 Commission approval of Section 104.00 was consistent with the Commission's 2008 approval of a virtually identical proposal by NYSE American LLC f/k/a NYSE Alternext US LLC f/k/a American Stock Exchange (hereinafter for ease of reference "NYSE American"). Prior to NYSE American's 2008 proposal, NYSE American listing applicants had the right to submit a formal application prior to being reviewed and appeal any adverse decision by the exchange staff to a committee of the exchange's board of directors. The NYSE American rules approved by the Commission in 2008 are identical to those of the Exchange -- including the requirement for an initial listing candidate to undergo a confidential informal review prior to being cleared to apply for listing, and the absence of any formal internal appeal from an adverse determination following the confidential review. The Commission approved NYSE American's proposed amendments to its initial listing process (which removed the appellate right), finding "the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 6 of the Act."[3]

Consequently, the Exchange believes that its process with respect to initial listing applications -- which the Commission recently positively considered in connection with both the 2008 NYSE American and 2013 NYSE proposals to adopt fundamentally identical listing application processes for each exchange without internal exchange appeal rights -- remains

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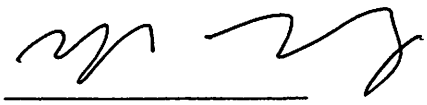
[2] See Exchange Act Release No. 34-70218 (August 15, 2013) (SR-NYSE-2013-33 (attached hereto as Exhibit 1, and also available at https://www.sec.gov/rules/sro/nyse/2013/34-70218.pdf).

[3] See Exchange Act Release No. 59050 (December 3, 2008) (SR-Amex-2008-70) (attached hereto as Exhibit 2, and also available at https://www.sec.gov/rules/sro/amex/2008/34-59050.pdf).

appropriate and consistent with its own rules and the Section 6 of the Act as previously applied by the Commission.

Dated January 16, 2020

Respectfully submitted,



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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-70218; File No. SR-NYSE-2013-33)

August 15, 2013

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1 to: (i) Delete the Sections in the Listed Company Manual (the "Manual") Containing the Listing Application Materials (Including the Listing Application and the Listing Agreement) and Adopt Updated Listing Application Materials that will be Posted on the Exchange's Website; and (ii) Adopt As New Rules Certain Provisions that are Currently Included in the Various Forms of Agreements That Are in the Manual, As Well As Some Additional New Rules that Make Explicit Existing Exchange Policies with Respect to Initial Listings

I. Introduction

On April 30, 2013, the New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] proposed rule changes ("Proposal") to (i) delete the sections in the Listed Company Manual (the "Manual") containing the listing application materials (including the listing application and the listing agreement) and adopt updated listing application materials that will be posted on the Exchange's website; and (ii) adopt as new rules certain provisions that are currently included in the various forms of agreements that are in the Manual, as well as some additional new rules that make explicit existing Exchange policies with respect to initial listings. The proposed rule change was published for comment in the Federal Register on May 17, 2013.[3] The Commission received one comment letter on the proposal.[4] On June 27, 2013, the Commission extended the

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

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 69565 (May 13, 2013), 78 FR 29165 ("Notice").

4 See Letter to Elizabeth M. Murphy, Secretary, Commission, from Shinichi Yuhara, dated June 4, 2013.

time period in which to either approve, disapprove, or to institute proceedings to determine whether to disapprove the Proposals, to August 15, 2013.[5] On August 14, 2013, the Exchange filed Amendment No. 1 to the proposed rule change.[6] This order approves the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Background

The Exchange proposes to: (i) delete the sections in the Manual containing the listing application materials (including the listing application and the listing agreement) and adopt updated listing application materials that will be posted on the Exchange's website; and (ii) adopt as new rules certain provisions that are currently included in the various forms of agreements that are in the Manual, as well as some additional new rules that make explicit existing Exchange policies with respect to initial listings.

Changes to the Listed Company Manual

The Exchange proposes changes to the Manual's requirements detailing the information an applicant is required to provide.[7] The Exchange has proposed to amend Sections 102.01C(F)

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5 See Securities Exchange Act Release No. 69878, 78 FR 40260 (July 3, 2013) (SR-NYSE-2013-33) ("Notice"). This letter suggested changing the title of proposed Section 107.01 to "Accounting Standards", a change made by the Exchange in Amendment No. 1.

6 Amendment No. 1, in pertinent part, corrects some minor errors in the marking of the rule text included in the initial filing (although these changes were accurately explained in the Purpose section to the notice), amends the title of proposed new rule 107.01, and deletes two provisions, amends one provision included in the proposed forms of listing agreements included in the initial filing, and amends the statutory basis section of the initial rule filing to specify that Section 904.03 ("Due Bill" Form Letter) will be renumbered as Section 904.01. This change was correctly reflected in the purpose section of the initial filing, however the statutory basis section of the initial filing inadvertently stated that Section 904.03 was being deleted rather than renumbered.

7 All rule references in this filing are to sections of the Manual unless otherwise specified. In addition to the changes discussed herein, the Exchange proposes to amend the following sections of the Manual to remove cross-references therein to sections that are proposed to be deleted or amended and to state that the required documents are on the Exchange's website or available from the Exchange upon request: Sections 102.01C(F)

and 103.01B(C) by adding language stating that the form of listing application and information regarding support documents required in connection with adjustments to historical financial data will be available on the Exchange's website or from the Exchange upon request. Similar changes are proposed for Sections 103.04 (with respect to American Depository Receipts), 104.01 (Domestic Companies), and 104.02 (Non-U.S. Companies).

New Section 104.00 would describe a free confidential review of the eligibility for listing undertaken by the Exchange of any company that: (i) requests such a review; and (ii) provides the documents listed in Section 104.01 (domestic companies) or Section 104.02 (non-U.S. companies). A company may submit an original listing application only after it has been cleared to do so by the Exchange following the completion of a confidential eligibility review.

New Section 107.00 ("Financial Disclosure and Other Information Requirements") would specifically set forth in the Manual certain financial requirements that NYSE states it currently requires of companies listing on the Exchange. Specifically, (i) new Section 107.01 would outline the accounting standards applicable to listed companies, (ii) new Section 107.02 would require all companies applying for initial listing to be audited by an independent public accountant registered with the Public Company Accounting Oversight Board, (iii) new Section 107.03 would stipulate that no security will be approved for listing if the issuer has not, for the 12 months immediately prior to the date of listing, timely filed all periodic reports required to be filed with the Commission or Other Regulatory Authority (as defined in the rule), and (iv) new

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(Minimum Numerical Standards—Domestic Companies—Equity Listings); 103.01B(C) (Minimum Numerical Standards Non-U.S. Companies Equity Listings); 103.04 (Sponsored American Depository Receipts or Shares ("ADRS")); 204.00(B) (Notice to and Filings with the Exchange); 204.04 (Business Purpose Changed); 204.13 (Form or Nature of Listed Securities Changed); 204.18 (Name Change); and 204.23 (Rights or Privileges of Listed Security Changed Last Modified: 8/21/2006). See Notice, supra note 3.

Section 107.04 would require all companies applying to list on the Exchange to provide the Exchange with any information or documentation necessary to make a determination regarding the initial listing.

The Exchange proposes to amend Sections 204.00, 204.04, 204.13, 204.18 and 204.23 to include a statement that the form of listing application and information regarding supporting documents required in connection with the listing application would be available on the Exchange's website or from the Exchange upon request.

The Exchange proposes to add a requirement to Section 311.01 that would stipulate that partial redemptions of listed securities must be done on a pro rata basis or by lot. In conjunction with this change, the Exchange has proposed to delete this requirement from the listing agreements for domestic and non-U.S. companies.

The Exchange proposes to add a requirement to Section 501.01 that would require listed companies to issue new certificates for listed securities replacing lost ones upon notification of loss of the original certificate and receipt of proper indemnity. In conjunction with this change, the Exchange has proposed to delete this requirement from the listing agreements for domestic and non-U.S. companies.

The Exchange further proposes to add a requirement to Section 501.02 that would require that, in the event of the issuance of any duplicate bond to replace a bond which has been alleged to be lost, stolen or destroyed and the subsequent appearance of the original bond in the hands of an innocent bondholder, either the original or the duplicate bond must be taken up and cancelled and the issuer must deliver to such holder another bond. In conjunction with this change, the Exchange has proposed to delete this requirement from the listing agreements for domestic and non-U.S. companies.

The Exchange has proposed to add certain requirements to Section 601.01 that were not previously embodied in any other rule. Provisions being added to Section 601.01(A) would require a transfer agent to comply with the rule of the Exchange, maintain officer for the purposes of transfer activities that are staffed by experienced personnel, provide adequate facilities foe the safekeeping of securities, maintain facilities to expedite transfers, and appoint an agent for service of process. A provision added to Section 601.01(B) would require the transfer agent to take immediate corrective action if the transfer agent's independent auditor specifies any material weaknesses, and provide a letter to the Exchange indicating that the material weaknesses have been corrected. The Exchange further proposes to delete Section 601.03 in its entirety, as it relates solely to the transfer agent and registrar agreements which the Exchange has also proposed to eliminate.

The Exchange proposes to amend Section 702.00 (Original Listing Application Securities of Other than Debt Securities) to replace the information currently in that section with a general outline of the listing process designed to be more descriptive of the listing process.[8] If, upon completion of this review, the Exchange determines that a company is eligible for listing, the Exchange will notify that company in writing (the "clearance letter") that it has been cleared to submit an original listing application.[9]

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8 The revised description states that a company that does not have any other class of securities listed on the Exchange must first seek a free confidential review of its listing eligibility as set forth in Section 104.00.

9 A clearance letter is valid for nine months from its date of issuance. If a company does not list within the nine month period, but wishes to list thereafter, the Exchange will perform anther confidential listing eligibility review as a condition to the issuance of a new clearance letter.

Upon receiving a clearance letter, a company choosing to list must file an original listing application.[10] Section 702.00 states that a company should submit drafts of the original listing application and other required documents as far in advance as possible of the time it seeks Exchange authorization of its application. Promptly after making a determination that a company is eligible to list but subject to payment of the Initial Application Fee, the Exchange shall inform such company in writing that it is entitled to receive a clearance letter upon payment of the applicable Initial Application Fee.[11]

In addition to the changes to Section 702.00 discussed above, the Exchange has proposed to delete Sections 702.01 (Introduction), 702.02 (Timetable for Original Listing of Securities Other than Debt Securities), 702.03 (Submission of Listing Application), 702.04 (Supporting Documents) and 702.05 (Printing of Application) and renumber subsequent sections. Section 702.01 describes the listing application as historically used, which was not on a set form and required companies to provide a narrative of the information relevant to the particular issue. The listing application form used going forward will be in the form of a questionnaire and the Exchange has stated that it will not require the sort of narrative that was historically included in the listing application, as this information, according to the Exchange, is typically all readily available in the company's Commission filings. In its filing, the NYSE stated that Section 702.02 is being eliminated because the timeline provided in that Section does not necessarily

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10 The original listing application and other required supporting documents can be found on www.nyx.com.

11 Section 902.03 requires certain categories of listing applicants to pay an Initial Application Fee as a prior condition to receipt of eligibility clearance. In its filing, the NYSE stated that the purpose of the notification in Section 702.00 is to assure any such company that it will not have to pay a non-refundable Initial Application Fee subject to any risk that it will not subsequently receive a clearance letter. Applicants that are not subject to the Initial Application Fee will not receive any similar notification, but rather will receive a clearance letter promptly after the Exchange has made an eligibility determination.

bear any relation to the listing experience of any individual company and, according to NYSE, is of limited practical value. Section 702.03 (Submission of Listing Application) is being deleted as the Exchange's requirements with respect to the submission of copies of the listing application will, as a result of the NYSE's proposal, now be set forth in detail in listing checklists posted on the Exchange's website. Section 702.04 (Supporting Documents) is also being deleted since, to the extent that the documents described in Section 702.04 continue to be relevant to the listing process, the Exchange will request them from issuers pursuant to the listing application checklists that will be available on the NYSE's website.

The following supporting documents currently required by Section 702.04, in its current form, and a brief discussion of whether each individual document will continue to be required under the NYSE's proposal and, if not, why not is discussed below:

- Signed Application: The Exchange will continue to require copies of the signed application but will require two signed copies of the application going forward rather than the signed copy and five conformed copies specified in Section 702.04 as fewer copies are needed for internal record keeping purposes.
- Charter and By-Laws: The charter and by-laws will continue to be required, but the copies will no longer need to be certified as certification is not necessary for the Exchange's review.
- Resolutions: The Exchange will continue to require copies of the applicable board resolutions, although they will no longer need to be certified, as certification is not necessary to the Exchange's review.
- Opinions of Counsel/Certificate of Good Standing: These documents will continue to be required.

- Stock Distribution Schedule: The Exchange proposes to eliminate the stock distribution schedule requirement as the Exchange believes it is obsolete because distribution information is available from the applicant's public filings and from its transfer agent.
- Certificate of Transfer Agent/Certificate of Registrar: The Exchange proposes to no longer require these documents because, according to the Exchange, the information about the applicant's outstanding shares is available in its prospectus or periodic Commission reports, as well as the report of the applicant's outstanding shares that will be required to be delivered to the Exchange once a quarter after listing.
- Notice of Availability of Stock Certificates: The Exchange proposes to no longer require this document as all transactions in listed securities in the national market system are conducted electronically through Depository Trust & Clearing Corporation ("DTCC").
- Specimens of the Securities for Which Listing Application is Made: The Exchange proposes to continue to require copies of specimen certificates, if any.
- Public Authority Certificate: The Exchange proposes to continue to require public authority certificates, where applicable.
- Prospectus: The Exchange does not propose to continue to require applicants to provide copies of their final prospectuses, as they are publicly available through the Commission's EDGAR system.
- Financial Statements: The Exchange does not propose to continue to require applicants to provide copies of their financial statements, as they are included in

the applicant's Commission filings which are publicly available through the Commission's EDGAR system.

- Adjustments to Historical Financial Data: The Exchange proposes to continue to require companies to provide copies of any adjusted financial data used in connection with the financial qualification for listing of the applicant.
- Listing Agreement: The Exchange proposes to require the applicable form of the proposed revised listing agreement as set forth in amended Exhibit 3 of the filing.
- Memorandum with Respect to Unpaid Dividends, Unsettled Rights and Record Dates: The Exchange proposes to no longer require this document, as all of the required information is included in the proposed revised listing application detailed in amended Exhibit 3 of the filing.
- Registration form under the Securities Exchange Act of 1934: The Exchange proposes to continue to require applicants to supply this document.

The Exchange noted that the second paragraph of Section 702.04 requires applicants to provide required documents at least one week prior to listing or, if this is not possible because of the nature of the document in question, as soon as practicable thereafter, but in any event prior to the first day of trading subject to the Exchange's conditional listing approval. Although the Exchange has proposed to delete Section 702.04, amended Section 702.00 will contain a similar requirement, with the exception of specifying the supporting documents be submitted one week before the Exchange needs to take action.

Section 702.05 (Printing of Application) is being deleted as it is obsolete and the Exchange has not distributed printed copies of approved listing applications for many years. In addition, the Exchange believes that the listing application has lost its relevance as a disclosure

document in recent decades due to the development of the SEC's own comprehensive disclosure system.

Section 703.00 is being amended by modifying subsections 703.01 through 703.14, relating to the application process and the filing of the listing application and any supplemental, or supporting, documents. References to the form of supplemental listing application set forth in Section 903.02 and also the lists of documents required to be submitted in connection with the relevant supplemental listing application are being deleted from these subsections. Various subsections will no longer contain a listing of the supplemental documents to be provided to the Exchange, but will state that the form of listing application and information regarding supporting documents required in connection with supplemental listing applications and debt securities applications are available on the Exchange's website or from the Exchange upon request. Section 703.01 Parts 1(A) and 2(B) and (C) currently require, respectively, that the application be in the form of a memo from the company and four signed typewritten copies of the supplemental listing applications provided to the Exchange. Section 703.01 Part 2(B) is being revised to remove an obsolete reference to the Exchange's weekly bulletin. Furthermore, Section 703.01 Part 2 (D) and (E), which refer to data that is to be provided in any subsequent listing application and a statement that the application need not be typed, are being removed from the Manual.

Section 802.01D is being revised with a provision explicitly providing that the Exchange may delist a company for a breach of the terms of its listing agreement.

In addition to the above described changes, various sections of the Manual are being revised to remove, or update, obsolete or incorrect cross-references.[12]

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[12] See, Notice, supra note 3

Proposed Changes to Listing Agreements

The Exchange proposes to remove from the Manual the current form of listing agreements for various types of company. In addition, the Exchange seeks to update the listing agreements used to reflect current practices at the exchange. According to the NYSE, the current form of listing agreements contained in the Manual reflect practices at the Exchange and in the securities markets generally that are no longer prevalent, such as the transfer of physical securities in Exchange transactions rather than the contemporary system of book entry transfer through DTCC. Consequently, NYSE believes that there are provisions in the listing agreements that are obsolete and the Exchange has proposed to delete these provisions.

The Exchange proposes to eliminate the Listing Securities Fee Agreement set forth in Section 902.01 of the Manual in its entirety.

The form of original listing application supplemental listing application, and summary of such applications contained in Section 903.01, Section 903.02, and 903.03, respectively, are being deleted from the Manual in their entirety. A revised form of the original listing application and the existing forms of the supplemental listing applications for certain issuances were provided in Exhibit 3 as part of the filing and these forms will be provided on the Exchange's website.

The Stock Distribution Schedule in Section 904.01 is being deleted as the Exchange obtains the distribution information required in Section 904.01 from the company's transfer agent. Exchange proposes to require applicants to provide the information in Section 904.02 (Unpaid Dividends, Unsettled Rights, and Record Dates—Memorandum) in the revised form of original listing application and, therefore, is deleting Section 904.02. In addition, Sections 904.03 ("Due Bill" Form Letter) and 904.04 (Foreign Currency Warrants and Currency Index

Warrants and Stock Index Warrants membership Circular) will be renumbered Sections 904.01 and 904.02, respectively.

Listing Agreements

In addition to changes to the various Section of the Manual, the Exchange has also proposed to make changes to the various Listing Agreements contained in the Manual. The revised listing agreements will be available on the Exchange's website and were submitted as part of the rule filing in Exhibit 3, and the amended forms submitted in the Exhibit 3 to Amendment No. 1. Specifically, the Exchange is removing Sections 901.01 (Listing Agreement for Domestic Companies), 901.02 (Listing Agreement for Foreign Private Issuers), 901.03 (Listing Agreement for Depository of a Foreign Private Issuer), 901.04 (For Japanese Companies – Free Share Distribution Understanding), and 901.05 (Listing Agreement for Voting Trusts). Although the Exchange is removing each of these agreements from the Manual, the Exchange will still be using each of these agreements, although in the listing agreements for domestic companies in 901.01 and foreign companies in 901.02 will be modified.

The Exchange proposes to delete from the domestic and foreign private issuers listing agreement certain requirements contained elsewhere in either the Manual or SEC Rules.[13] Such provisions, among other things, relate to: (i) changes in the general character or nature of the company's business; (ii) changes in the company's officers or directors; (iii) disposition of any property or of any stock interest in any subsidiary or controlled companies; and (iv) change in, or removal of, collateral deposited under any mortgage or trust indenture, under which securities of a company listed on the Exchange has been issued. The Exchange has also proposed to remove

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13 See Notice, supra note 3. The Commission notes that although these items are being removed from the listing agreement, the underlying obligation to provide this information continues to exist in some form either through NYSE rules or Commission requirements.

from the listing agreement the requirement that a company file with the Exchange: (i) four copies of all material mailed by a company to its stockholders with respect to any amendment or proposed amendment to its Certificate of Incorporation; (ii) a copy of any amendment to a company's Certificate of Incorporation, or resolution of Directors in the nature of an amendment, certified by the Secretary of the state of incorporation, as soon as such amendment or resolution shall have been filed in the appropriate state office; and (iii) a copy of any amendment to a company's By-Laws. The Exchange has also proposed to remove from the listing agreement the requirement that a company disclose: (i) in its annual report to shareholders certain information relating to options and options plan;[14] and (ii) certain information relating to the reacquisition or disposition of previously issued stock for the company's account, within ten days after the close of a fiscal quarter.[15]

In addition, the Exchange is proposing to delete the requirement that a company notify the Exchange of all facts relating to the purchase, direct or indirect, of any of its securities listed on the Exchange at a price in excess of the market price of such security prevailing on the Exchange at the time of such purchase.[16] The requirement prohibiting a company from selecting any of its securities listed on the Exchange for redemption otherwise than by lot or pro rata, and from setting a redemption date earlier than fifteen days after the date corporate action is taken to authorize the redemption is also being deleted.[17] The Exchange is further proposing to delete the

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14 According to the NYSE, this information is no longer necessary because Commission rules provide for comprehensive disclosure regarding options as the Commission previously approved removal of a similar requirement in an NYSE rule for that reason.

15 According to the Exchange, this is no longer needed in the agreement because it is identical to requirement 204.25 of the Manual.

16 See Notice, supra note 3, which discusses why the Exchange believes this isn't necessary.

17 The Commission notes that the Exchange has proposed to add a requirement to Section 311.01 that would stipulate that partial redemptions of listed securities must be done on a

requirement that a company give notice of any corporate action which will result in the redemption, cancellation or retirement, in whole or in part, of any of its securities listed on the Exchange. The requirement that a company notify the Exchange at least 10 days in advance of action taken to fix a stockholders' record date, or to close the transfer books, for any purpose, is being deleted because it already is contained in Sections 204.06, 204.17, 204.21 and 401.02 of the Manual.

The Exchange is also proposing to delete the requirement that, in case the securities to be listed are in temporary form, the company agrees to order permanent engraved securities within thirty days after the date of listing because all securities traded through the facilities of the Exchange are now traded electronically. The requirement prohibiting a company from making any change in the form or nature of any of its securities listed on the Exchange, nor in the rights or privileges of the holders thereof, without having given twenty days' prior notice to the Exchange of the proposed change, and having made application for the listing of the securities as changed if the Exchange shall so require, is being removed from the listing agreement.[18] The Exchange also proposes to delete the requirement that a company make available to the Exchange, upon request, the names of member firms of the Exchange which are registered owners of stock of the Corporation listed on the Exchange.

The requirement to notify the Exchange of any diminution in the supply of stock available for the market occasioned by deposit of stock under voting trust agreements or other

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pro rata basis or by lot. The other provisions being deleted are already in existing Section 204.22 and 311.01.

[18] The Commission notes that this requirement will continue to exist in Section 204.13 of the Manual.

deposit agreements is also being deleted.[19] The Exchange has proposed to delete the requirement that a company make application to the Exchange for the listing of additional amounts of securities listed on the Exchange sufficiently prior to the issuance thereof to permit action in due course upon such application.[20]

The Exchange proposes to delete the provision requiring a company publish at least once a year and submit to its stockholders at least fifteen days in advance of the annual meeting of such stockholders, and not later than three months after the close of the last preceding fiscal year of the Corporation, certain balance sheets, a surplus and income statements.[21] As noted by the Exchange, this requirement is in some respects duplicative of Commission rules. In addition, the Exchange is deleting the requirement, in the listing agreement, that: (i) all financial statements contained in annual reports of a company to its stockholders be audited by independent public accountants qualified under the laws of some state or country, and will be accompanied by a copy of the certificate made by them with respect to their audit of such statements showing the scope of such audit and the qualifications, if any, with respect thereto;[22] and (ii) the company promptly notify the Exchange if it changes its independent public

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19 The Commission notes that this requirement will continue to exist in Section 204.09 of the Manual.

20 The Commission notes that this requirement will continue to exist in Section 703.01 Part 2 of the Manual.

21 For foreign private issuers, the NYSE notes that eliminating this requirement is a substantive change. However, in its original filing, NYSE stated that the SEC's proxy rules are not applicable to foreign private issuers and, in conformity with that position, the NYSE does not intend to impose such requirements itself. The Commission notes that certain companies will still be required to comply with the Commission's proxy rules, applicable to domestic listed companies, contained in Regulation 14A – Solicitation of Proxies, which requires issuers to distribute annual reports when soliciting proxies. See also, note 38, infra, and accompanying text.

22 The Commission notes that this requirement will continue to exist in new Section 107.02 of the Manual.

accountants regularly auditing the books and accounts of the company. The Commission notes that this requirement will continue to exist in Section 204.03. The requirement that all financial statements contained in a company's annual reports to its stockholders be in the same form as the corresponding statements contained in the company's listing application, and disclose any substantial items of unusual or non-recurrent nature, is also being deleted.

The requirement that a company or its subsidiaries not make any substantial charges against capital surplus, without notifying the Exchange is being removed from the listing agreement.[23] The requirement that a company or its subsidiaries not make any substantial change in accounting methods or policies as to depreciation and depletion, or in bases of valuation of inventories or other assets, without providing notice and disclosure of such change is being deleted. The Exchange also proposes to delete from the listing agreement the requirement that a company will maintain an audit committee in conformity with Exchange requirements.[24]

The requirement that a company maintain an office or agency for specified corporate purposes is being deleted along with the requirement that a company maintain registrar for specified corporate purposes. The requirement that a company have on hand at all times a sufficient supply of certificates to meet the demands for transfer and provide copies of preferences of stock classes in certain circumstances is being deleted. The Exchange proposes to delete certain requirements that a company publish information in connection with certain corporate actions along with the requirement for domestic companies that a company solicit

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[23] The Commission notes that this requirement will continue to exist in Section 204.05 of the Manual.

[24] The Commission notes that this requirement will continue to exist in Sections 303A.06 and 303A.07 of the Manual. See Notice, supra, note 3.

proxies for all meetings of stockholders.[25] The foreign listing agreement will, however, be modified as noted below to include a solicitation requirement.

Some of the key provisions that will be included in the reformulated listing agreements for domestic companies and foreign private issuers are: (i) a certification by the issuer that it understands and agrees to comply with all current and future rules, listing standards, procedures and policies of the Exchange; (ii) an agreement by the issuer to promptly notify the Exchange in writing of any corporate action or other event which will cause the issuer to cease to be in compliance with Exchange listing requirements; (iii) the issuer agrees to maintain a transfer agent and registrar which satisfies the requirements set forth in Section 601.00 of the Manual et seq.; (iv) the issuer agrees to file all required periodic financial reports with the SEC, including annual reports and, where applicable, quarterly or semi-annual reports, by due date established by the SEC; (v) the issuer agrees to comply with all requirements under the federal securities laws and applicable SEC rules; and (vi) that nothing contained in, or inferred from the listing agreement shall be construed as constituting a contract for the continued listing of the company's securities and that the company understands that the Exchange may suspend the company's securities and commence delisting proceedings with or without prior notice upon failure of the company to comply with one or more sections of the listing agreement. In addition to the above key provisions, foreign private issuers must also agree to: (i) solicit proxies from U.S. holders for all meetings of shareholders; and (ii) not appoint any successor or additional Depository unless such Depository has entered into a listing agreement with the Exchange.

Listing Application

The Exchange has proposed deleting from the Manual the form of original listing

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[25] The Commission notes that these requirements will continue to exist in Sections 202.05, 202.06, 202.12 and 402.04 of the Manual. See Notice, supra note 3.

application contained in Section 903.01 (Listing Applications). The revised form of original listing application will be provided on the Exchange's website. In general, the information the Exchange proposes to remove from the Listing Application is being removed because the Exchange believes such information is available in the applicant's filings with the SEC, made pursuant to the Exchange Act or the Securities Act of 1933.[26] Information being removed from the Listing Application includes the following: (i) a discussion of the history and present business of the company; (ii) for public utilities, a description of the services renders, territory and population covered, and other segmented information about the utility; (iii) a description of the physical property of the company; (iv) information related to affiliated companies; (v) information related to 10% owners of the company; (vi) a description of control held by another company; (vii) information related to the management of the company, including names and titles of all directors and officers; (viii) a summary of the authorized stock capitalization of the company since organization; (ix) a description of the funded debt of the company and any subsidiaries or controlled companies; (x) a summary of the rights, preferences, privileges and priorities of the stock of the company along with any indentures or restrictions related to the stock; (xi) a description of the number of employees along with a description of any work stoppages due to labor disagreements and any pension, retirement, bonus or other plans of benefit which may be in effect; (xii) a description of shareholder relations procedures that are followed; (xiii) a description of any dividends paid; (xiv) a description of the terms and conditions of any options, purchase warrants, conversion rights or other commitments which

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[26] 15 U.S.C. 77a. When listing a company in connection with its initial public offering or other securities offering, the Exchange relies on the company's Securities Act prospectus that registered the transaction. See Notice, supra note 3 for details of the types of filings NYSE relies on for companies transferring from another market or over-the-counter market, or listing in connection with certain transactions.

may require the company to issue its securities; (xv) a description of all pending litigation of a material nature; (xvi) information relating to the independent public accountants, Chief Executive Officer, Chief Financial Officer, any potential future commodity commitments the company may make, and other policies that could be material in determining the company's financial position; and (xvii) information relating to the financial statements of the company. Specific information that will continue to be required as part of the application, although in a different form, includes: (i) a statement that the application is the company's original listing application; and (ii) a description of the shares being offered (number, date of authorization, and purpose of authorized but unissued shares).

Transfer Agent Agreements

The Exchange has proposed to delete from the Manual the forms of transfer agent and registrar agreements currently set forth in Sections 906.01, 906.02 and 906.03 of the Manual. In both of its revised listing agreements, the Exchange has included an explicit agreement by the applicant issuer to abide by the transfer agent and registrar requirements set forth in Section 601.00 of the Manual et seq. The Exchange does not believe the use of transfer agent and registrar agreements is necessary because, as is detailed in the Notice, each provision contained in the transfer agent and registrar agreements can also be found in Section 601.00 of the Manual et seq. Furthermore, the Exchange does not believe it needs to enter into agreements with the transfer agent and registrar because any company whose transfer agent and registrar do not comply with Section 601.00 of the Manual et seq, would not be eligible for original, or continued, listing on the Exchange.

III. Discussion and Commission Findings

After careful review, 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.[27] Specifically, the Commission finds that the Proposal is consistent with Section 6(b)(5) of the Act,[28] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, as discussed in more detail below, the Commission believes that the Proposal is consistent with the investor protection and public interest goals of the Exchange Act because the rules of the Exchange will continue to ensure that the NYSE has the information needed, whether through Commission filings or the applicant issuer, to conduct a rigorous review of an application for listing. In addition, among other things, and as discussed in more detail below, the rule changes should increase transparency in the listing process as well as further investor protection by codifying into the listing agreement the requirement that a listed company must comply with all the rules of the Exchange as well as the federal securities laws and rules thereunder.

The Commission finds that the changes proposed to Sections 102.01C, 103.01B, 103.04, 104.01, 104.02, 204.00, 204.04, 204.13, 204.18, 204.23, 703.01 (part 1), 703.02 (part 3), 703.04, 703.05, 703.06, 703.07, 703.08, 703.09, 703.10, 703.11, 703.12, 703.13, 703.14, each of which provide that the form of listing application and information regarding supporting documents are available on the Exchange's website or from the Exchange upon request, are consistent with the act in that they make the necessary forms widely available. The Commission notes, and the Exchange acknowledged in its original filing, that in the event that the Exchange makes any

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27 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).

28 15 U.S.C. 78f(b)(5).

substantive changes to the documents being removed from the Manual,[29] the Exchange will be required, under Section 19b(1) of the Act, to submit a rule filing to obtain approval of such changes.[30] Furthermore, the Commission notes that the Exchange has represented that it will maintain all historical versions of those documents on its Web site after changes have been made in order to make it possible to review how each document has changed over time.[31]

The Exchange proposed to add new Section 104.00 describing the Exchange's free confidential review process. The application process is further described in Section 702.00 which describes the steps an issuer must follow in obtaining a clearance letter. Among other clarifications about the confidential review and listing process, the new language states that if a company has to pay an initial application fee, that it will be informed in writing that upon payment of the fee, it will receive a clearance letter to list. This process should give issuers certainty that they will not have to pay a non-refundable initial application fee if they will not be receiving a clearance letter to list. The Commission finds the addition of rule language describing the application process to be consistent with the protection of investor and the public interest in that it makes the listing application process more transparent for issuers.

The Exchange has proposed to amend Sections 104.01 and 104.02 to remove the requirement that the copy of the charter and by-laws (or equivalent constitutional documents) be

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29 As noted in the Notice, these documents include the listing application and the listing agreement. See 78 FR 29165. These documents were submitted as part of the NYSE's rule filing as Exhibit 3 and amended Exhibit 3 to the filing.

30 See 78 FR 29165. The Exchange represented that in the event that the Exchange makes any substantive changes (including changes to the rights, duties, or obligations of the applicant or the Exchange, or that would otherwise require a rule filing), it will submit a rule filing to the Commission to obtain approval of such changes. The Exchange noted that it would not submit a rule filing if the changes made to a document are typographical or stylistic in nature.

31 The Commission notes that this should allow it to monitor for compliance with Section 19(b) of the Act.

certified and to require that specimens of bonds or stock certificates be provided only if they exist. The Commission finds these changes to be consistent with the protection of investors and the public interest in that they make it easier for issuers to comply with the listing application requirements without weakening the quality of information provided to the Exchange.

The Exchange believes that the provisions the Exchange proposes to include in new Section 107.00 are consistent with the protection of investors and the public interest. The requirements included in proposed Section 107.00 are all policies the Exchange has long applied as part of its initial listing process and they are important in ensuring that only qualified companies are admitted to listing. These provisions specify the accounting standards upon which a listing determination will be made, require the issuer's auditor to be PCAOB registered, require the timely filing of periodic reports, and comply with any Exchange requests for additional information and documentation. The Commission finds these provisions to be consistent with the Act in that they provide the Exchange with additional abilities to ensure that only qualified companies are listed on the Exchange.

The Exchange further proposed to change Section 501.01 to require listed companies to issue new certificates for securities listed on the Exchange, replacing lost ones upon notification of the loss and receipt of proper indemnity. Amended Section 501.02(c) would require that, following the issuance of a duplicate bond issued to replace a lost, stolen or destroyed bond, should the original bond subsequently appear in the hands of an innocent bondholder, the original or duplicate bond must be taken up and cancelled. The Commission notes that these provisions are identical to those currently set forth in the existing forms of listing agreements, which the Exchange is proposing now to delete from the Manual in this filing. The Commission

believes these provisions are consistent with the Act in that they are intended to protect shareholders and innocent bondholders.

The Exchange has proposed to delete Sections 906.01, 906.02 and 906.03 from the Manual and will no longer be entering into contracts with transfer agents. As a result, the Exchange proposed to amend Sections 601.01(A) and (B) to reflect the addition of certain provisions currently found in Sections 906.01, 906.02 and 906.03. The provisions being added to Sections 601.01(A) would require that the transfer agent: (i) comply with the rules of the Exchange; (ii) maintain offices for the purposes of transfer activities that are staffed by experienced personnel; (iii) maintain adequate facilities for the safekeeping of securities; (iv) maintain facilities to expedite transfers; (v) appoint an agent for service of process. The provision being added to Section 601.01(B) would require the transfer agent to take immediate corrective action on any material weakness specified in the auditor's report and submit a subsequent letter indicating that the material weakness has been corrected. The provision also notes that no approval to act in a dual capacity as transfer agent or registrant will be approved until the auditor's report has been delivered. The Exchange is deleting Section 601.03 in its entirety since it merely contains cross-references to Sections 906.01, 906.02 and 906.03. The listing agreement will also require the issuer to maintain a registered transfer agent and a registrar, as necessary, which satisfies the requirements of Section 601.00. The Commission believes these changes are consistent with the protection of investors and the public interest since the specific requirements being deleted will still be included in Section 601.01 of the Manual. Furthermore, if a listed company does not use a transfer agent that is in compliance with the provisions contained in Section 601.01, which includes capital surplus requirements, such company would no longer meet the requirements set forth in the Manual and the listing

agreement and could be delisted from the Exchange. The Commission believes this will ensure that a listed company will have a qualified transfer agent and registrar at all times while listed on the Exchange, protecting investors and the public interest.

The Exchange's proposed deletion of Section 702.01 of the Manual in its current form, as described above, is consistent with the protection of investors and the public interest, as it simply eliminates a description which is not accurate as it relates to the listing application process proposed to be adopted pursuant to this filing. The indicative timeline for the original listing of securities proposed to be deleted from Section 702.02 is very approximate and, according to NYSE, does not necessarily bear any relation to the listing experience of any individual company. The proposed changes to Sections 702.03, 702.04 and 702.05 of the Manual are consistent with the protection of investors and the public interest, as the information required to be included in the listing application that is detailed in these Sections will either continue to be required, or is readily available from another source (such as the Commission's EDGAR system).[32] As a result, the Exchange does not feel that it is necessary to include those requirements in the Manual. The Commission believes that the elimination of these Sections from the Manual is consistent with the protection of investors and the public interest as it simplifies the listing process without sacrificing any of the substantive information available to the Exchange. Furthermore, the elimination of these provisions could result in a cost savings for the issuer, and therefore investors, while not resulting in any significant weakening in the regulatory requirements.

The Commission believes that the proposed deletions from Sections 703.01 through

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32 See Notice, supra note 3,for a detailed discussion of these items and whether they are retained or not and, if not, why. In addition the list of supporting documents to be retained was submitted as part of the rule filing in Exhibit 3, as amended.

703.14, relating to the application process and the filing of the listing application and any supplemental, or supporting, documents, is consistent with the Act as the information required to be provided by these Sections would still be required as part of the Listing Application or are readily available from other sources (such as the Commission's EDGAR system).[33] In addition, the Exchange has retained certain language in its rules covering the listing application process and a suggested timetable for filing an application.[34]

The Commission believes that the proposed addition to the Exchange's continued listing criteria, Section 802.01D, of the stipulation that a listed company could face delisting if it breaches the terms of its listing agreement is consistent with the Act as it sets forth specifically in the Manual the Exchange's ability to remove unsuitable companies from its market for such violations. While, as NYSE notes, it currently has broad discretion to delist a company when its continued listing is inadvisable, the Commission believes that explicitly stating that a violation of the listing agreement may result in delisting provides transparency to listed companies and investors, and is consistent with the terms of the listing agreement. The Commission also believes that the removal of unsuitably listed companies serves to protect investors and the public interest.

The proposed modifications to the domestic and foreign listing agreements, and their removal from the Manual, are consistent with the protection of investors and the public interest because: (i) certain provisions are duplicative and are already included elsewhere in the

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33 See Notice, supra note 3. In its filing, NYSE noted that each subsection of Section 703.00 would be modified to state that the form of listing application and the information regarding supporting documents required in connection with supplemental listing applications and debt securities applications would be available on the Exchange's website or from the Exchange upon request.

34 See, for example, changes to 703.01 (Part 1) and 703.01 (Part 2) being proposed in the Exhibit 5 to the rule filing.

Manual;[35] (ii) certain provisions are no longer applicable and their removal is consistent with previous actions by the Commission to eliminate similar requirements; (iii) certain provisions are no longer relevant in light of changes to the structure and practices in the securities markets;[36] or (iv) certain provisions, as is discussed above, have been added to the Manual or new agreements. Removing Sections 901.00-901.05, 902.01 and 903 of the Manual and adding them to the Exchange's website are consistent with the protection of investors and the public interest, as the proposed changes streamline the Exchange's listing process, making it more easily understood, while at the same time do not result in a weakening of the Exchange's regulatory requirements.[37]

The Commission notes that certain key provisions, discussed above, are either being added or will remain in the reformulated listing agreements. These provisions include: (i) an acknowledgement by the issues that a violation of all current and future rules, listing standards, procedures and policies of the Exchange along with a failure by the issuer to promptly notify the Exchange of any corporation action or other event that causes the issuer to cease to be in compliance with the Exchange's listing requirements could result in removal of the issuer's securities from listing and trading on the Exchange; (ii) a requirement that the issuer file all required periodic financial reports with the Commission, including annual reports and, where applicable, quarterly or semi-annual reports by the due dates established by the Commission; and

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35 See Exhibit 3 for a full list of supporting documents still required. We note that other Exchanges do not list the supporting documents required to be included with an application for listing.

36 For example, public companies now make a significant number of disclosure via the Commission's EDGAR system, including the disclosure of the public company's annual and quarterly financial statements. NYSE has represented that, in addition to its other surveillance activities, it relies, in part, on information available in EDGAR when monitoring companies for compliance with listing standards and other Exchange rules, and when evaluating a prospective company for listing.

37 The Commission notes that making certain agreements available via the Exchange's website would be consistent with the manner in which similar agreement are made available by other national securities exchanges.

(iii) a requirement that the issuer agrees to comply with all requirements under the federal securities laws and applicable Commission rules. The Commission believes that the inclusion of these provisions is consistent with the Act in that each of these provisions aids in the protection of investors and the public interest. In addition, the Commission notes that the listing agreement for foreign private issuers includes the requirement that foreign private issuers solicit proxies from U.S. holders for all meetings of shareholders.[38] The Commission believes that this is an important provision consistent with the Act as it provides U.S. investors with information relating to the meetings of shareholders for companies that are not required to follow U.S. proxy rules, thus aiding in the protection of investors and the public interest.[39] The Commission believes that a listed company should deliver the proxy statement in a sufficient period of time before the shareholder meeting so as to allow shareholders time to receive, review and vote on the information set forth in the proxy materials and annual report.[40] In other words, the Commission expects that, in order to satisfy this requirement of the listing agreement, foreign private issuers would solicit proxies from U.S. investors sufficiently in advance of the shareholder meeting so as to allow U.S. investors a reasonable opportunity to vote.[41]

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38 See also, NYSE Rule 402 and Section 203.01 of the Manual which applies to all listed companies, foreign and domestic.

39 The Commission notes that other exchanges do not have specific requirements relating to the timeframes under which proxies must be provided to investors. Instead, exchanges generally rely on the rules of the Commission or the jurisdiction under which they have been incorporated.

40 See Securities Exchange Act Release No. 33768 (March 16, 1994).

41 The Commission notes that domestic issuers already have to do so under Commission proxy rules. The Commission, however, also notes that while foreign private issuers are not required to follow proxy rules promulgated by the Commission, Section 4 of the Listing Manual contains certain provisions regarding shareholders' meetings and proxies. See 17 CFR 240.3a-12-3(b).

One key change being made to the listing agreements is the removal of certain requirements relating to disclosures about the issuers business, financial and accounting policies. Specifically, the Exchange has proposed to remove from the listing agreement the requirement that an issuer disclose how long the independent public accountant has audited the company's accounts; whether their audit is continuous or periodic, or the extent of their authority. However, the Commission notes that Regulation S-X contains requirements relating to auditor independence that provide assurances as to the independence and qualifications of the auditor that, in the Commission's opinion, more than adequately replace the requirements being deleted by the proposal. As a result, the Commission believes that these changes are consistent with the Act.

Many of the provisions that are being removed from the listing agreement, as noted above, are being removed because they are already included in other sections of the Manual or NYSE believes it no longer needs the issuer to provide additional information because it is obsolete or already receives the information through Commission filings and its monitoring of such through EDGAR. For example, one eliminated provision had required companies to provide four copies of all material mailed to stockholders with respect to amendments or proposed amendments to its certificate of incorporation. NYSE indicated that it has other rules that require companies to provide it with copies of notices to shareholders concerning charter amendments. In addition, NYSE noted that its rules require listed companies to submit to it copies of all proxy material submitted to shareholders. While the Commission notes that the current requirement in the listing agreement requires copies of all communications to shareholders concerning an amendment to its certificate of incorporation, we are satisfied that the requirements in NYSE's rules should provide it with adequate notice of changes to a company's

certificate of incorporation for purposes of monitoring compliance with Exchange rules and corporate actions that could impact the trading of the company's securities. Another example concerns the deletion, from the listing agreement, of the requirement that a listed company promptly notify the Exchange of any action to fix a stockholders' record date, or to close the transfer books, and that it will give the Exchange at least ten days' notice in advance of such record date or closing of the books. In support of deleting these from the listing agreement the Exchange cited several existing Sections of the Manual that contain these requirements and also stated that it notifies companies of these requirements in a letter sent annually to all listed companies. The Commission continues to believe that notification to the Exchange 10 days in advance of fixing a date for taking a record of shareholders and the closing of the transfer books is important. As a result, the deletion from the listing agreement simply recognizes that this is already covered elsewhere in NYSE's rules.

Other provisions of the listing agreement that are being permitted to be deleted, such as a requirement that a listed company will not make any substantial change in accounting methods without notifying the Exchange and disclosing the effect of any such change in its next interim and annual report to its stockholders, are being done in recognition of the fact that, under Commission disclosure rules, any changes in accounting methods and its effect on the company would have to be disclosed in Commission filings, such as 10-Ks and 10-Qs. Exchange monitoring of such filings, as well as material news requirements under Exchange rules, should give the Exchange the information necessary to monitor for compliance with Exchange rules, and listing standards, along with any potential trading impact. As a result, the Commission believes it is consistent with investor protection and the public interest to remove this provision from the listing agreement. Finally, some of the requirements in the current listing agreement are

being updated to reflect current requirements. For example, in terms of publishing quarterly statements of earnings to the same degree of consolidation as in the annual report, the Exchange is adding a provision that the listed company agrees to file all required periodic financial reports with the Commission, including annual reports and, where applicable, quarterly or semi- annual reports, by the due dates established by the Commission. In summary, the Commission notes that provisions being deleted from the Manual because they are covered elsewhere under Exchange rules, or under Commission requirements, are not meant to provide support that the Commission no longer believes these provisions are necessary. Rather, based on the NYSE's filing, we are satisfied these substantive provisions are covered elsewhere in Exchange or Commission rules.

The proposed deletions of Sections 904.01 through 904.03 of the Manual are consistent with the protection of investors and the public interest, as: (i) the Stock Distribution Schedule in Section 904.01 is obsolete because the Exchange has indicated it obtains the distribution information it needs from the company's transfer agent; (ii) the information required by Section 904.02 would still be required in the revised listing application.

The proposed modifications to the listing application are consistent with the protection of investors and the public interest, because the Exchange is simply eliminating from the application information requirements that are duplicative of disclosure requirements under the Federal securities laws or where similar disclosure provisions under the Federal securities laws provide information sufficient for the Exchange to make informed determinations about the suitability of issuers for listing.

A significant number of changes are technical in nature and relate to updating internal cross-references and rule numbering as a result of the changes described above. As a result, the

Commission finds these changes consistent with the act as they work to protect investors and the public interest by removing confusion in the application and organization of the Manual.

IV. Accelerated Approval of Proposed Rule Changes, as Modified by Amendment No. 1

The Amendment No. 1 revised the proposal to, among other things, ensure that the rule text provided is properly marked, therefore reducing confusion when determining which rule changes have been proposed and remove unnecessary provisions from the listing agreements. In addition, changes proposed in Amendment No. 1 will clarify and strengthen the Exchange's proposal and listing application process, and avoid redundancies and ambiguities that exist in the original filing, thereby making the listing process more streamlined and efficient. Accordingly, the Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,[42] for approving the proposal, as modified by Amendment No. 1, prior to the 30th day after the date of publication of notice in the Federal Register.

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42 15 U.S.C. 78s(b)(2).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[43] that the proposed rule changes (SR-NYSE-2013-33), as modified by the Amendment No. 1, be, and hereby are, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[44]

Kevin M. O'Neill
Deputy Secretary

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43 15 U.S.C. 78s(b)(2).

44 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59050; File No. SR-Amex-2008-70)

December 3, 2008

Self-Regulatory Organizations; American Stock Exchange LLC; Order Approving Proposed Rule Change as Modified by Amendment No. 1 thereto, to Revise its Initial Listing Process to Eliminate the Current Appeal Process for Initial Listing Decisions, Add a New Confidential Pre-application Eligibility Review Process, and Upgrade its Listing Requirements by Eliminating the Alternative Listing Standards

I. Introduction

On September 4, 2008, the American Stock Exchange LLC ("Amex," or the "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 amend the procedures for initial listing of securities on Amex. On September 17, 2008, Amex filed Amendment No. 1 to the proposed rule change. The proposed rule change was published for comment in the Federal Register on September 24, 2008.[3] Initially one comment was received opposing the proposed rule change.[4] NYSE Alternext US LLC[5] filed a response on October 22, 2008.[6] Subsequently, an additional comment letter was

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

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 58570 (September 17, 2008), 73 FR 55185 ("Notice").

4 See letter from Brendan E. Cryan, Managing Member Brendan E. Cyran & Company, LLC, and Jonathan Q. Frey, Chief Operating Officer of J. Streicher & Co. L.L.C., dated October 10, 2008 ("Specialist Letter 1").

5 NYSE Alternext US LLC ("Alternext") is the successor to the Amex, after being acquired by the New York Stock Exchange LLC ("NYSE").

6 See letter from Janet Kissane, Corporate Secretary, NYSE Alternext US LLC, dated October 22, 2008 ("Alternext Response Letter")

received in response to Alternext's letter.[7] This order approves the proposed rule change, as modified by Amendment No. 1 thereto.

II. Description of the Proposal

Sections 101(e) and 1203(c) of the Amex Company Guide currently provide that the securities of certain issuers which do not satisfy any of the Exchange's regular initial listing standards may nonetheless be eligible for initial listing on the Exchange pursuant to the Exchange's appeal procedures, which include authorization of approval of the listing by a Listing Qualifications Panel of the Exchange's Committee on Securities, if (a) the issuer satisfies one of two minimum numerical alternative listing standards, and (b) the Listing Qualifications Panel makes an affirmative finding that there are mitigating factors that warrant listing pursuant to these alternative listing standards.[8] The Exchange proposes to eliminate the two alternative listing standards.[9] In addition, to align its initial listing process with the process in place at the NYSE, the Exchange proposes to amend Sections 101 and 1201-1206 of the Amex Company Guide to eliminate the current appeal process for initial listing decisions by the Exchange. The Exchange believes that requiring listing applicants to meet the requirements of the Exchange's regular initial listing standards will strengthen and enhance its listing standards. Further, the Exchange's experience with its existing initial listing appeal process is that it has almost never been utilized, and never successfully, to appeal a staff determination on the basis that such

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7 See letter from Jonathan Q. Frey, Chief Operating Officer of J. Streicher & Co. L.L.C., dated October 30, 2008 ("Specialist Letter 2").

8 The issuer is also required to make an announcement through the news media that it has been approved for listing pursuant to the alternative listing standards. See Section 1203(c)(iii) of the Amex Company Guide.

9 The Exchange notes that a relatively small number of companies are listed on the Exchange each year under the two alternative listing standards that are being eliminated under the proposed rule change. See infra note 18.

determination was erroneous. According to Amex, the few appeals made have been by issuers seeking listing under the two aforementioned alternative listing standards (which can only be achieved through the appeal processes).

The Exchange also proposes to add a new mandatory confidential pre-application eligibility review process for companies considering an initial listing on the Exchange. Pursuant to this process, company officials seeking a listing on the Exchange would be required to undertake preliminary confidential discussions with the Exchange, prior to submitting a formal listing application, to determine whether its securities are eligible for listing approval. Only after a company has cleared the confidential pre-application eligibility review and has been authorized by the Exchange to proceed may it file an original listing application and complete the other formal steps in the original listing process pursuant to Section 202 of the Amex Company Guide.[10] The information needed for the purpose of conducting a confidential pre-application eligibility review is set forth in current Sections 210 - 222 of the Amex Company Guide.[11] There will be no charge to the company in connection with the confidential pre-application eligibility review.

The Exchange anticipates that the proposed new confidential pre-application eligibility review process will enable it to provide an issuer with guidance and clarification on whether or not it is eligible for listing on a more expeditious basis. The Exchange believes that the new confidential pre-application eligibility review process will provide a fair procedure, consistent

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10 The confidential pre-application eligibility review process would be comparable to the process in place at the NYSE as described in Sections 101, 104 and 701 of the NYSE Listed Company Manual.

11 Sections 210-220 of the Amex Company Guide currently contain requirements for original listing applications. With the adoption of the pre-application eligibility review, these same criteria will be required for that process as well.

with Section 6(b)(7) of the Act,[12] for all issuers seeking listing, including those that receive an adverse determination. Specifically, consistent with the Exchange's current review process, initial listing eligibility determinations must be made in accordance with the criteria specified in the Exchange's listing standards, following a rigorous staff analysis and managerial oversight. The Exchange asserts that this structured review process, based on transparent standards, mitigates against erroneous determinations.

The Exchange represents that it has considered how to transition the proposed rule change and proposes the following treatment for issuers that have applications currently in process for an initial listing on the Exchange. Any initial listing applications that are already filed and in process with the Exchange as of the date of effectiveness of this proposed rule change ("Legacy Applications") will be treated as if they were still governed by the initial listing procedures in the Amex Company Guide as in effect immediately prior to such date of effectiveness, which effective date will be the date of approval of the rule change by the Commission. Consequently, companies with Legacy Applications would have the right to appeal the initial listing decision and to be evaluated for listing under the alternative initial listing standards that are being eliminated by this filing. To this end, the Exchange proposes the addition of a temporary Section 1212T to the Amex Company Guide. Temporary Section 1212T will contain the current initial listing provisions of the Amex Company Guide that reference the alternative listing standards and other provisions of Part 12 that are applicable to such alternative standards, which are otherwise being proposed for deletion from the Amex Company Guide. The temporary provisions of Rule 1212T will apply solely to the Legacy Applications and will otherwise be of no force or effect.

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12 15 U.S.C. 78f(b)(7).

In addition to the changes discussed above, the Exchange is also proposing three other minor changes of a "housekeeping" nature to the text of the Amex Company Guide. Section 206, containing an outdated and non-substantive reference to listing day, would be eliminated. An outdated reference in Section 1202 to the Listing Investigations Department (which no longer exists) would be deleted under the proposed rule change. Finally, language in Section 1201(d) listing a number of non-quantitative factors that the Exchange will consider in evaluating an initial listing application would be eliminated under the proposal, because those factors (and certain others) are already set forth in Section 101.

Amex filed the proposed rule change to implement a NYSE Euronext business plan for the Amex after the consummation of the transactions contemplated by the merger agreement dated January 17, 2008 among the Exchange, the Amex Membership Corporation, NYSE Euronext and certain other entities, whereby a successor to the Exchange will become an indirect, wholly-owned subsidiary of NYSE Euronext (the "Acquisition"). The Acquisition was completed on October 1, 2008, so pursuant to the implementation schedule set forth by the Exchange, the proposal will take effect upon Commission approval.[13]

III. Summary of Comments

Specialist Letter 1 objects to the Exchange's elimination of the alternative listing standards and states that, at a minimum, Amex should be required to more fully explain its concerns with the alternative standards so that the commenters and the public can adequately analyze the proposal.[14] In this regard, Specialist Letter 1 raised several issues or requests for

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13 See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 58995 (October 1, 2008); see Notice, supra 3.

14 See Specialist Letter 1, supra note 4.

additional clarification.[15] First, Specialist Letter 1 is skeptical of the Exchange's proposition that the elimination of the two alternative listing standards will strengthen and enhance the initial listing standards.[16] The Exchange responded that this is adequately addressed in the Notice and that the Exchange made a business determination to eliminate the alternative listing standards which impose a less stringent standard than the regular initial listing standards. The Exchange noted that elimination of the alternative listing standards will require that all companies seeking listing on the Exchange to satisfy the more stringent regular listing standards, which in the Exchange's view will strengthen and enhance its initial listing standards.[17] The Exchange further noted that in each full year since 2002, the number of companies approved for listing under the alternative listing standards was minimal and that due to these small numbers, the process was disproportionately cumbersome and resource intensive.[18] Therefore, the Exchange concludes elimination of the alternative listing standards will have a relatively minimal impact on listings on the Exchange or Exchange equity specialists.

Second, Specialist Letter 1 argues that the Exchange fails to offer any analysis or facts to support its proposal. Such analysis, Specialist Letter 1 states, will help determine whether alternatives that are less detrimental may exist. In response, the Exchange states that it is not required to demonstrate that companies listed under the alternate standards have performed worse than other listed companies, and that a decision to reasonably increase its listing standards is a business decision within its purview.

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15 See Specialist Letter 1, supra note 4.

16 See Specialist Letter 1, supra note 4, at 2.

17 See Response Letter, supra note 5, at 1-2.

18 Since 2003, only 16 companies were approved under the alternative standards in comparison with 455 under the regular standards.

Third, Specialist Letter 1 raises the concern that the proposed rule change will have a negative impact on the companies that will not otherwise qualify for listing on the Exchange if the alternative initial listing standards are eliminated.[19] The Exchange believes that adequate trading venues, such as the Over the Counter ("OTC") Bulletin Board exist for those companies that cannot meet the Exchange's regular initial listing standards.[20] The Exchange further notes that as these companies grow in other markets, they may later become eligible for listing under the Exchange's regular initial listing standards.

Finally, Specialist Letter 1 questions whether NYSE Euronext supports the proposed rule change.[21] The Exchange noted in the Notice that the proposed changes to the initial listing process were part of its strategic business planning in anticipation of its acquisition by NYSE Euronext and was aimed at more closely aligning its listing process with the NYSE.[22] The Response Letter confirms that NYSE supports the Exchange's proposal.[23]

Specialist Letter 2[24] argues, among other things, that it is not consistent with Section 6 of the Act for the Exchange to simply justify its proposal as a business decision entirely within its purview. Specialist Letter 2 also states that the Exchange failed to answer questions on whether companies listed under the alternative standards performed poorly as compared to other listed companies, and that this information should be a matter of public record. The commenter argues

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19 See Specialist Letter 1, supra note 4, at 2. In particular, the commenters note that elimination of the standards will result in more companies trading in less regulated, less liquid, and more expensive markets and will impact capital formation for such companies.

20 See Response Letter, supra note 6, at 2.

21 See Specialist Letter 1, supra note 4, at 2-3.

22 See Response Letter, supra note 6, at 3.

23 Id.

24 Specialist Letter 2 was submitted by one of the two commenters who submitted Specialist Letter 1. See supra note 7.

that it is difficult to understand why the Exchange would want to reduce its ability to list companies at a time it is losing its top tier companies to NYSE which could raise questions about the "future health and well being of the Exchange."[25] The commenter also reiterates its position that relegating these companies to alternate markets does not seem to be in the public interest. Finally, the commenter notes, among other things, that the Exchange still has not been able to show any harm from listing companies under the alternative standards, and that the Exchange should be required to provide facts and analysis to support a finding that elimination of the alternative standards are in the public interest.[26]

IV. Discussion and Commission Findings

After careful consideration, 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[27] and, in particular, the requirements of Section 6 of the Act.[28] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[29] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, 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

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25 See Specialist Letter 2, supra note 7 at 2.

26 Id. at 3.

27 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).

28 15 U.S.C. 78f.

29 15 U.S.C. 78f(b)(5).

a national market system, and, in general, to protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The Exchange proposes to eliminate the appeal procedures for initial listing decisions. The Exchange further proposes to eliminate the alternative listing standards on which almost all of such initial listing appeals are based. As a result of the proposed rule change, all companies that list on the Exchange must meet the requirements of the Exchange's regular initial listing standards which are higher than the alternative initial listing standards.[30]

The Commission has carefully considered both of the comments. The commenters argue that Amex has not justified elimination of the alternative listing standards and should be required to provide facts and analysis to support a finding that the proposal is in the public interest. They further note that to do otherwise would accede to the Exchange's view that they are not required to show that companies listed under the alternative standards have performed more poorly than other companies and that the decision to eliminate the alternative standards is totally a business decision that is within its purview. The commenters believe this analysis ignores the requirements of Section 6 of the Act that requires proposals of the Exchange to only be approved if they are in the public interest.

After carefully considering these comments, the Commission believes that the proposal as to the elimination of the alternative listing standards are reasonable and consistent with the Act, and furthers investor protection and the public interest. In making this finding, the Commission notes at the outset that the development and enforcement of adequate standards governing the initial and continued listing of securities on an exchange is an activity of critical

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30 See Amex Company Guide Sections 210-222 for current initial listing standards. See also Response Letter, supra note 6 at Exhibit A which contains a comparison of regular initial listing standards versus alternative listing standards.

importance to financial markets and the investing public. Listing standards serve as a means for an exchange to screen issuers and to provide listed status only to bona fide companies that have, or in the case of an initial public offering will have, sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets. Adequate standards are especially important given the expectations of investors regarding exchange trading and the imprimatur of listing on a particular market.

Based on the above analysis, the Commission would find it difficult to justify denying an exchange the ability to eliminate lower listing standards under the Act, assuming the elimination of such standards are done on a fair and equitable basis, does not unfairly discriminate between issuers as required under Section 6(b)(5) of the Act, and there remain sufficient listing and regulatory requirements to ensure adequate depth and liquidity for listed companies, and the protection of investors and the public interest. Where all of these factors exist, as the Commission finds in the Amex's proposal, the Commission believes that it is within the Exchange's business judgment to determine it no longer wants to qualify for listing these type of smaller companies under its rules.[31] The Commission emphasizes that its approval of the Amex's proposal is not being based solely on the business judgment of the Exchange. While the Exchange's determination to eliminate the alternative initial listing standards may indeed by motivated by its business judgment, the Commission nevertheless believes that fact does not

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31 The Commission notes that under the Exchange's rules, the approval of an application for listing of securities is a matter solely within the discretion of the Exchange. Further, the Commission notes that the rule permits the Exchange to deny listing even if the company meets the listing standards. See Amex Company Guide Section 101.

preclude us from finding, as we do for the reasons discussed herein, that the proposal is consistent with the requirements of the Act and Section 6(b)(5) in particular.[32]

In making this finding the Commission notes that Amex has provided for Legacy Applications so that any issuer that was currently being considered under the Amex's initial listing standards up to the date of approval of this rule filing could still avail itself of the alternative listing standards if it so qualified. This helps to ensure that issuers currently in the process of applying for initial listing on Amex would not suddenly find the alternative standards unavailable due to the approval of this rule proposal. Further, companies that initially listed on the Exchange under the alternative listing standards will remain listed and not be affected by the proposal, which is on a going forward basis. In this regard, Amex's regular initial listing and continued listing standards remain the same for all listed companies.

The Commission notes that in terms of potential harm to issuers who no longer will be able to avail themselves of the Amex alternative initial listing standards, alternative trading venues exist for these companies as noted on in the Exchange's Response Letter.[33] As discussed above, existing listed companies and Legacy Applicants will not be adversely affected in any way by the Exchange's proposal. The Commission does not believe the Exchange is required to maintain lower listing standards to accommodate the potential for listings in the future,

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32 See also Securities Exchange Act Release No. 56606 (October 3, 2007), 72 FR 57982 (October 11, 2007) (approving proposed rule change by NYSE Arca, Inc. to amend initial listing standards that would have the effect of excluding from qualification some companies that previously qualified for initial listing)

33 While the commenters argue that such alternative markets will provide less protection for shareholders, the Commission need not make a qualitative judgment about such markets to address this concern. Rather, the Commission believes that it is sufficient to determine that given the importance of listing standards and the expectations of investors in terms of the types of companies listed on a national securities exchange as discussed above, it will further the public interest by eliminating the Exchange's lower listing standards and requiring all listed companies to meet the existing higher regular initial listing standards.

especially when alternative markets exist and all companies have an equal opportunity to apply under regular initial listing standards.

Finally, the Commission recognizes that the commenters, as specialists on the Exchange, may potentially be losing the ability to make a market in securities of companies that could have qualified for listing under the alternative standards. However, as provided in the Amex Response Letter, the majority of companies are listed on the Exchange under the regular initial listing standards, while listing under the alternative standards has only represented a small percentage of the overall listings on the Amex. For example, in 2007 of 109 new listings, 2 were under the alternative standards. Further, those companies that no longer qualify for initial listing could, as noted by Amex, apply in the future for an Amex listing after developing a trading market in an alternative market place. The Act does not dictate that Amex continue to list companies that cannot qualify under the regular listing standards because of the potential loss of business. Indeed, to require Amex to retain its alternative listing standards for that reason would, in itself, be a business decision. For all the reasons discussed above, the Commission believes that the proposal to eliminate the alternative initial listing standards is reasonable and should continue to provide only for the listing of securities with a sufficient investor base to maintain fair and orderly markets and adequately protect investors and the public interest.

The Commission also believes that the establishment of a mandatory confidential pre-application review is reasonable and consistent with the Act.[34] The Commission notes that the new confidential pre-application eligibility review criteria are set forth in the Amex Company Guide.[35] The pre-application review process will enable the Exchange to obtain information

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34 The NYSE currently has a similar process in place; see Sections 101, 104 and 701 of the NYSE Listed Company Manual.

35 See proposed Section 201 of the Amex Company Guide.

from companies seeking a listing and provide the issuer with guidance and clarification on whether or not it is eligible for listing. The proposal should therefore make the listing process more efficient for both the Exchange and potential listed companies. Accordingly, the Commission believes that the changes adequately protect investors and the public interest.

Finally, the Commission notes that the elimination of the outdated and redundant provisions is consistent with the Act and should make the Company Manuel easier and clearer to use.

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and in particular Section 6 of the Act and the rules and regulations thereunder.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change, as amended (File No. SR-Amex-2008-70) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[36]

Florence E. Harmon
Acting Secretary

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36 17 CFR 200.30-3(a)(12).