

pools of liquidity. A member may choose to display quotations relating to its market-making unit on Nasdaq and its ECN on ADF. Under such circumstances, NASD believes that compliance with NASD Rule 4613A(e)(1) would, in effect, require the member to consolidate these distinct business units for purposes of displaying quotations on each market, which would be contrary to the business model of the firm since these quotes represent separate liquidity pools. As an alternative, the member could establish separate broker/dealers for each business unit, which NASD believes is overly burdensome for members given the marginal benefits associated with NASD Rule 4613A(e)(1).

For the reasons discussed above, the proposed rule change would repeal NASD Rule 4613A(e)(1). However, NASD represents that it will continue, as it currently does today, to monitor and surveil for any potentially collusive or manipulative conduct relating to quotation activity on markets under its regulatory authority.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,⁴ which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change accomplishes these ends. In light of the Commission's vendor display rule, NASD believes NASD Rule 4316A(e)(1) does not serve any additional beneficial purposes and may, in fact, interfere with competition and certain member's business models.

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

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

Written comments were neither solicited nor received.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which NASD consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. In particular, the Commission solicits comment on (i) whether the proposed rule change will facilitate multiple quotations that erode SEC Rule 11Ac1-1 and (ii) whether the proposed rule change will facilitate locking or crossing the quotes of other market centers. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-NASD-2003-175. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hard copy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of NASD.

All submissions should refer to File No. SR-NASD-2003-175 and should be submitted by February 26, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁵

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04-2361 Filed 2-4-04; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49154; File No. SR-NYSE-2003-43]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendments Nos. 1 and 2 Thereto by the New York Stock Exchange, Inc. and Order Granting Accelerated Approval of the Proposed Rule Change To Establish a Pilot Program To Amend the Minimum Numerical Standards (Sections 102.01C, 103.01B, 802.01B, and 802.01C of the Listed Company Manual)

January 29, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 22, 2003, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange.³ On January 19, 2004, the NYSE submitted Amendment No. 1 to the proposed rule change.⁴ On January 23, 2004, the NYSE submitted Amendment No. 2 to the proposed rule change.⁵ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons. For the reasons discussed below, the Commission is granting accelerated approval of the proposed rule change on a six-month pilot basis.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ With the permission of NYSE, the Commission has made typographical, non-substantive corrections to the text of the proposed rule change. See Telephone conversation between Annemarie Tierney, Assistant General Counsel, NYSE, and Susie Cho, Special Counsel, Division of Market Regulation ("Division"), Commission on January 21, 2004.

⁴ See Letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated January 16, 2004 ("Amendment No. 1"). Amendment No. 1 replaced the original proposed rule change in its entirety.

⁵ See Letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated January 22, 2004 ("Amendment No. 2"). Amendment No. 2

⁴ 15 U.S.C. 78o-3(b)(6).

⁵ 17 CFR 200.30-3(a)(12).

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

The NYSE is proposing to amend, on a pilot basis, to expire on July 29, 2004, Sections 102.01C, 103.01B, 802.01B and 802.01C of the Exchange's Listed Company Manual (the "Manual") regarding the minimum numerical original and continued listing standards. Proposed new language is *italicized*; proposed deletions are in [brackets].

* * * * *

Listed Company Manual

102.00 Domestic Companies

* * * * *

102.01C A company must meet one of the following financial standards.

(I) *Earnings Test* (1) Pre-tax earnings from continuing operations and after minority interest, amortization and equity in the earnings or losses of investees as adjusted [(E)] for items specified in (2)(a) through (i) below [(F)] must total at least[.]

[\$2,500,000 in the latest fiscal year together with \$2,000,000 in each of the preceding two years; or \$6,500,000] *\$10,000,000* in the aggregate for the last three fiscal years together with a minimum of \$[4,5]2,000,000 in the two most recent fiscal years, and positive amounts [for] *in all* [each of the preceding two] *three* years.

(2) Adjustments (E)(F) that must be included in the calculation of the amounts required in paragraph (1) are as follows:

(a) Application of Use of Proceeds. If a company is in registration with the SEC and is in the process of an equity offering, adjustments should be made to reflect the net proceeds of that offering, and the specified intended application(s) of such proceeds to:

(i) Pay off existing debt. The adjustment will include elimination of the actual historical interest on debt being retired with offering proceeds of all relevant periods. If the event giving rise to the adjustment occurred during a time-period such that *pro forma* amounts are not set forth in the SEC registration statement (typically, the *pro forma* effect of repayment of debt will be provided in the current registration statement only with respect to the last fiscal year plus any interim period in accordance with SEC rules), the company must prepare the relevant adjusted financial data to reflect the adjustment to its historical financial data, and its outside audit firm must provide a report of having applied agreed-upon procedures with respect to such adjustments. Such report must be prepared in accordance with the

standards established by the American Institute of Certified Public Accountants.

(ii) Fund an acquisition:

(1) The adjustments will include those applicable with respect to acquisition(s) to be funded with the proceeds. Adjustments will be made that are disclosed as such in accordance with Rule 3-05 "Financial Statements of Business Acquired or to be Acquired" and Article 11 of Regulation S-X. Adjustments will be made for all the relevant periods for those acquisitions for which historical financial information of the acquiree is required to be disclosed in the SEC registration statement; and

(2) Adjustments applicable to any period for which *pro forma* numbers are not set forth in the registration statement shall be accompanied by the relevant adjusted financial data to combine the historical results of the acquiree (or relevant portion thereof) and acquiror, as disclosed in the company's SEC filing. Under SEC rules, the number of periods disclosed depends upon the significance level of the acquiree to the acquiror. The adjustments will include those necessary to reflect (a) the allocation of the purchase price, including adjusting assets and liabilities of the acquiree to fair value recognizing any intangibles (and associated amortization and depreciation), and (b) the effects of additional financing to complete the acquisition. The company must prepare the relevant adjusted financial data to reflect the adjustment to its historical financial data, and its outside audit firm must provide a report of having applied agreed-upon procedures with respect to such adjustments. Such report must be prepared in accordance with the standards established by the American Institute of Certified Public Accountants.

(b) Acquisitions and Dispositions: In instances other than acquisitions (and related dispositions of part of the acquiree) funded with the use of proceeds, adjustments will be made for those acquisitions and dispositions that are disclosed as such in a company's financial statements in accordance with Rule 3-05 "Financial Statements of Business Acquired or to be Acquired" and Article 11 of Regulation S-X. If the disclosure does not specify pre-tax earnings from continuing operations, minority interest, and equity in the earnings or losses of investees, then such data must be prepared by the company's outside audit firm for the Exchange's consideration. In this regard, the audit firm would have to issue an independent accountant's report on

applying agreed-upon procedures in accordance with the standards established by the American Institute of Certified Public Accountants.

(c) Exclusion of Merger or Acquisition Related Costs Recorded under Pooling of Interests;

(d) Exclusion of Charges or Income Specifically Disclosed in the Applicant's SEC Filing for the Following:

(i) In connection with exiting an activity for the following:

- (1) Costs of severance and termination benefits
- (2) Costs and associated revenues and expenses associated with the elimination and reduction of product lines
- (3) Costs to consolidate or re-locate plant and office facilities
- (4) Loss or gain on disposal of long-lived assets

(ii) Environmental clean-up costs

(iii) Litigation settlements

(e) Exclusion of Impairment Charges on Long-lived Assets (goodwill, property, plant, and equipment, and other long-lived assets);

(f) Exclusion of Gains or Losses Associated with Sales of a Subsidiary's or Investee's Stock;

(g) Exclusion of In-Process Purchased Research and Development Charges;

(h) Regulation S-X Article 11 Adjustments. Adjustments will include those contained in a company's *pro forma* financial statements provided in a current filing with the SEC pursuant to SEC rules and regulations governing Article 11 "Pro forma information of Regulation S-X Part 210—Form and Content of and Requirements for Financial Statements."

(i) Exclusion of the Cumulative Effect of Adoption of New Accounting Standards. (APB Opinion No. 20)

Or

(II) *Valuation/Revenue Test*. *Companies listing under this standard may satisfy either (a) the Valuation/Revenue with Cash Flow Test or (b) the Pure Valuation/Revenue Test.*

(a) *Valuation/Revenue with Cash Flow Test*—[A Company with]

(1) [not less than] *At least \$500,000,000 in global market capitalization, [and]*

(2) *At least \$100,000,000 in revenues during the most recent 12 month period, [must] and*

(3) [demonstrate from the operating activity section of its cash flow statement that its cash flow, which represents net income adjusted to (a) reconcile such amounts to cash provided by operating activities, and (b) exclude changes in operating assets and

liabilities, is] at least \$25,000,000 [in the] aggregate *cash flows* for the last three fiscal years [and each year is reported as a] with positive amounts in all three years, as adjusted [(E)(F)] pursuant to Para. 102.01C (I)(2)(a) and (b), as applicable.

A Company must demonstrate cash flow based on the operating activity section of its cash flow statement. Cash flow represents net income adjusted to (a) reconcile such amounts to cash provided by operating activities, and (b) exclude changes in operating assets and liabilities. With respect to reconciling amounts pursuant to this Paragraph, all such amounts are limited to the amount included in the company's income statement.

(b) *Pure Valuation/Revenue Test*—

(1) At least \$750,000,000 in global market capitalization, and

(2) At least \$75,000,000 in revenues during the most recent fiscal year.

In the case of companies listing in connection with an IPO, the company's underwriter (or, in the case of a spin-off, the parent company's investment banker or other financial advisor) must provide a written representation that demonstrates the company's ability to meet the \$750,000,000 global market capitalization requirement based upon the completion of the offering (or distribution). For all other companies, market capitalization valuation will be determined over a six-month average.

[Or

(III) For companies with not less than \$1 billion in total worldwide market capitalization and with not less than \$100 million revenues in the recent fiscal year, there are no additional financial requirements. For such companies listing in connection with an IPO, the market capitalization valuation must be demonstrated by written representation from the underwriter (or, in the case of a spin-off, by a written representation from the parent company's investment banker or other financial advisor) of the total market capitalization of the company upon completion of the offering (or distribution). For all other such companies, the market capitalization valuation will be determined over a six-month average.]

Or

(III) *Affiliated Company Test*

(1) at least \$500,000,000 in global market capitalization;

(2) at least 12 months of operating history (although a company is not required to have been a separate corporate entity for such period); and

(3) the company's parent or affiliated company is a listed company in good

standing (as evidenced by written representation from the company or its financial advisor excluding that portion of the balance sheet attributable to the new entity); and

(4) the company's parent or affiliated company retains control of the entity or is under common control with the entity.

"Control" for purposes of the *Affiliated Company Test* will mean having the ability to exercise significant influence over the operating and financial policies of the listing company, and will be presumed to exist where the parent or affiliated company holds 20% or more of the listing company's voting stock directly or indirectly. Other indicia that may be taken into account when determining whether control exists include board representation, participation in policy making processes, material intercompany transactions, interchange of managerial personnel, and technological dependency. The *Affiliated Company Test* is taken from and intended to be consistent with generally accepted accounting principles regarding use of the equity method of accounting for an investment in common stock.

(E) Only adjustments arising from events specifically so indicated in the company's SEC filing(s) as to both categorization and amount can and must be made. Any such adjustment applies only in the year in which the event occurred except with regard to the use of proceeds or acquisitions and dispositions. Any company for which the Exchange relies on adjustments in granting clearance must include all relevant adjusted financial data in its listing application as specified in Para. 702.04, and disclose the use of adjustments by including a statement in a press release (i) that additional information is available upon which the NYSE relied to list the company and is included in the listing application and (ii) that such information is available to the public upon request.

(F) [The above-referenced adjustments are measured and recognized] *Interested parties should apply the list of adjustments* in accordance with any relevant accounting literature, such as that published by the Financial Accounting Standards Board ("FASB"), the Accounting Principles Board ("APB"), the Emerging Issues Task Force ("EITF"), the American Institute of Certified Public Accountants ("AICPA"), and the SEC. Any literature is intended to guide issuers and investors regarding the affected adjustment listed. If successor interpretations (or guidelines) are

published with respect to any particular adjustment, the most recent relevant interpretations (or guidelines) should be consulted.

* * * * *

[(IV) *Affiliated Company Standard*
(1) Market capitalization of \$500 million or greater (as evidenced by written representation from the underwriter, company, or its investment advisor);

(2) Minimum of 12 months of operations (although it is not required to have been a separate corporate entity for such period);

(3) Parent or affiliated company is a listed company in good standing (as evidenced by written representation from the company or its financial advisor excluding that portion of the balance sheet attributable to the new entity); and

(4) Parent/affiliated company retains control* of the entity or is under common control* with the entity.

*"Control" for these purposes will mean the ability to exercise significant influence over operating and financial policies, and will be presumed to exist when the parent involved holds directly or indirectly 20% or more of the entity's voting stock. Other indicia that may be taken into account for this purpose include board representation, participation in policy making processes, material intercompany transactions, interchange of managerial personnel, and technological dependency. This test is taken from and intended to be consistent with generally accepted accounting principles regarding use of the equity method of accounting for an investment in common stock.]

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103.00 Non-U.S. Companies

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103.01 Minimum Numerical Standards—Non-U.S. Companies—Equity Listings Distribution

* * * * *

103.01B A company must meet one of the following financial standards:

(I) *Earnings Test*

(1) Pre-tax earnings from continuing operations and after minority interest, amortization and equity in the earnings or losses of investees adjusted [(C)(D)] for items specified in para. 102.01C(I)(2)(a) through (i) above, and 103.01B(I)(2) below, must total at least[:] \$100,000,000 in the aggregate for the last three fiscal years [together] with a minimum of \$25,000,000 in each of the most recent two fiscal years.

(2) Additional Adjustment (C)(D) Available for Foreign Currency Devaluation. Non-operating adjustments when associated with translation adjustments representing a significant devaluation of a country's currency (e.g., the currency of a company's country of domicile devalues by more than 10 percent against the U.S. dollar within a six-month period). Adjustments may not include those associated with normal currency gains or losses. (3) Reconciliation to U.S. GAAP of the third year back would only be required if the Exchange determines that reconciliation is necessary to demonstrate that the aggregate \$100,000,000 threshold is satisfied.

Or

(II) Valuation/Revenue Test

Companies listing under this standard may satisfy either (a) the Valuation/Revenue with Cash Flow Test or (b) the Pure Valuation/Revenue Test.

(a) Valuation/Revenue with Cash Flow Test—[A Company with]

(1) [not less than] at least \$500,000,000 in global market capitalization, [and]

(2) at least \$100,000,000 in revenues during the most recent 12 month period, [must] and

(3) [demonstrate from the operating activity section of its cash flow statement that its operating cash flow excluding changes in operating assets and liabilities is] at least \$100,000,000 [in the] aggregate cash flows for the last three fiscal years where each of the two most recent years is reported at a minimum of \$25,000,000, [as] adjusted in accordance with (C)(D) [for] Para. 102.01C (I)(2) (a) and (b).

A Company must demonstrate cash flow based on the operating activity section of its cash flow statement. Cash flow represents net income adjusted to (a) reconcile such amounts to cash provided by operating activities, and (b) exclude changes in operating assets and liabilities. With respect to reconciling amounts pursuant to this Paragraph, all such amounts are limited to the amount included in the company's income statement.

Reconciliation to U.S. GAAP of the third fiscal year back would only be required if the Exchange determines that reconciliation is necessary to demonstrate that the [aggregate] \$100,000,000 aggregate cash flow threshold is satisfied.

(b) Pure Valuation/Revenue Test—

(1) at least \$750,000,000 in global market capitalization, and

(2) at least \$75,000,000 in revenues during the most recent fiscal year.

In the case of companies listing in connection with an IPO, the company's underwriter (or, in the case of a spin-off, the parent company's investment banker or other financial advisor) must provide a written representation that demonstrates the company's ability to meet the \$750,000,000 global market capitalization requirement upon completion of the offering (or distribution). For all other companies, market capitalization valuation will be determined over a six-month average.

[Or

(III) For companies with not less than \$1 billion in total worldwide market capitalization and with not less than \$100 million revenues in the recent fiscal year, there are no additional financial requirements. For such companies listing in connection with an IPO, the market capitalization valuation must be demonstrated by a written representation from the underwriter (or, in the case of a spin-off, by a written representation from the parent company's investment banker, other financial advisor or transfer agent) of the total market capitalization of the company upon completion of the offering (or distribution). For all other such companies, the market capitalization valuation will be determined over a six-month average.]

Or

III. *Affiliated Company Test*

(1) at least \$500,000,000 in global market capitalization;

(2) at least 12 months of operating history (although a company is not required to have been a separate corporate entity for such period); and

(3) the company's parent or affiliated company is a listed company in good standing (as evidenced by written representation from the company or its financial advisor excluding that portion of the balance sheet attributable to the new entity); and

(4) the company's parent or affiliated company retains control of the entity or is under common control with the entity.

"Control" for purposes of the Affiliated Company Test will mean having the ability to exercise significant influence over the operating and financial policies of the listing company, and will be presumed to exist where the parent or affiliated company holds 20% or more of the listing company's voting stock directly or indirectly. Other indicia that may be taken into account when determining whether control exists include board representation, participation in policy making processes, material

intercompany transactions, interchange of managerial personnel, and technological dependency. The Affiliated Company Test is taken from and intended to be consistent with generally accepted accounting principles regarding use of the equity method of accounting for an investment in common stock.

(C) Only adjustments arising from events specifically so indicated in the company's SEC filing(s) as to both categorization and amount can and must be made. Any such adjustments apply only in the year in which the event occurred except with regard to the use of proceeds or acquisitions and dispositions. Any company for which the Exchange relies on adjustments in granting clearance must include all relevant adjusted financial data in its listing application as specified in Para. 702.04, and disclose the use of adjustments by including a statement in a press release (i) that additional information is available upon which the NYSE relied to list the company and is included in the listing application and (ii) that such information is available to the public upon request.

(D) Interested parties should apply the list of adjustments in accordance with any relevant accounting literature, such as that published by the Financial Accounting Standards Board ("FASB"), the Accounting Principles Board ("APB"), the Emerging Issues Task Force ("EITF"), the American Institute of Certified Public Accountants ("AICPA"), and the SEC. Any literature is intended to guide issuers and investors regarding the affected adjustment listed. If successor interpretations (or guidelines) are published with respect to any particular adjustment, the most recent relevant interpretations (or guidelines) should be consulted.

[(IV) Affiliated Company Standard

(1) Market capitalization of \$500 million or greater (as evidenced by written representation from the underwriter, company, or its investment advisor);

(2) Minimum of 12 months of operations (although it is not required to have been a separate corporate entity for such period);

(3) Parent or affiliated company is a listed company in good standing (as evidenced by written representation from the company or its financial advisor excluding that portion of the balance sheet attributable to the new entity); and

(4) Parent/affiliated company retains control* of the entity or is under common control * with the entity.

* “Control” for these purposes will mean the ability to exercise significant influence over operating and financial policies, and will be presumed to exist when the parent involved holds directly or indirectly 20% or more of the entity’s voting stock. Other indicia that may be taken into account for this purpose include board representation, participation in policymaking processes, material intercompany transactions, interchange of managerial personnel, and technological dependency. This test is taken from and intended to be consistent with generally accepted accounting principles regarding use of the equity method of accounting for an investment in common stock.]

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802.00 Continued Listing

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802.01 Continued Listing Criteria

The Exchange would normally give consideration to delisting a security either a domestic or non-U.S. issuer when:

* * * * *

802.01B Numerical Criteria for Capital or Common Stock

[If] A[a] company that falls below [any of the following] the criteria applicable to it [, it] is subject to the procedures outlined in Paras. 802.02 and 802.03[:].

(I) A company that qualified to list under the Earnings Test set out in Para. 102.01C(I) or in Para. 103.01B(I) will be considered to be below compliance standards if:

(i) [A] average global market capitalization over a consecutive 30 trading-day period is less than [\$50,000,000] \$75,000,000 and, at the same time, total stockholders’ equity is less than [\$50,000,000] \$75,000,000 (C); or

(ii) [A] average global market capitalization over a consecutive 30 trading-day period is less than [\$15,000,000; or] \$25,000,000.

(II) A company that qualified to list under the Valuation/Revenue with Cash Flow Test set out in Para. 102.01C(II)(a) or Para. 103.01B(II)(a) will be considered to be below compliance standards if:

(i) Average global market capitalization over a consecutive 30 trading-day period is less than \$250,000,000 and, at the same time, total revenues are less than \$20,000,000 over the last 12 months (unless the company qualifies as an original listing under one of the other original listing standards) (D) ; or

(ii) Average global market capitalization over a consecutive 30 trading-day period is less than \$75,000,000.

(iii) For companies that qualified for original listing under the “global market capitalization” standard] (III) A company that qualified to list under the Pure Valuation/Revenue Test set out in Para. 102.01C(II)(b) or Para. 103.01B(II)(b) will be considered to be below compliance standards if:

(i) [A] average global market capitalization over a consecutive 30 trading-day period is less than [\$500,000,000] \$375,000,000 and, at the same time, total revenues are less than [\$20,000,000] \$15,000,000 over the last 12 months (unless the [resultant entity] company qualifies as an original listing under one of the other original listing standards) (D); or

(ii) average global market capitalization over a consecutive 30 trading-day period is less than \$100,000,000.

(IV) A company that qualified to list under the Affiliated Company Test set out in Para. 102.01C(III) or Para. 103.01B(III) is not subject to any

continued numerical standards unless:

(i) the listed company’s parent/affiliated company ceases to control the listed company, or

(ii) the listed company’s parent/affiliated company itself falls below the continued listing standards described to the parent/affiliated company.

In such case, the listed company that qualified to list under the Affiliated Company Test will be considered to be below compliance standards at any time that:

(i) average global market capitalization over a consecutive 30 trading-day period is less than \$75,000,000 and, at the same time, total stockholders’ equity is less than \$75,000,000 (C); or

(ii) average global market capitalization over a consecutive 30 trading-day period is less than \$25,000,000.

When applying the market capitalization test in any of the above [three] four standards, the Exchange will generally look to the total common stock outstanding (excluding treasury shares) as well as any common stock that would be issued upon conversion of another outstanding equity security. The Exchange deems these securities to be reflected in market value to such an extent that the security is a “substantial equivalent” of common stock. In this regard, the Exchange will only consider securities (1) publicly traded (or quoted), or (2) convertible into a publicly traded (or quoted) security. For

partnerships, the Exchange will analyze the creation of the current capital structure to determine whether it is appropriate to include other publicly traded securities in the calculation.

[Affiliated Companies—Will not be subject to the \$50,000,000 average global market capitalization and stockholders’ equity test unless the parent/affiliated company no longer controls the entity or such parent/affiliated company itself falls below the continued listing standards described in this section.]

Funds, REITs and Limited Partnerships [-] will be subject to immediate suspension and delisting procedures if [(1)] the average market capitalization of the entity over 30 consecutive trading days is below [\$15,000,000] \$25,000,000 [or (2)]. In addition, [in the case of] a Fund [,] is subject to immediate suspension and delisting if it ceases to maintain its closed-end status. [, and in the case of a] A REIT is subject to immediate suspension and delisting if[, it] fails to maintain its REIT status (unless the resultant entity qualifies for an original listing as a corporation).

The Exchange will notify the Fund, REIT or limited partnership if the average market capitalization falls below [\$25,000,000] \$35,000,000 and will advise the Fund, REIT or limited partnership of the delisting standard. Funds, REITs and limited partnerships are not subject to the procedures outlined in Paras. 802.02 and 802.03.

Bonds [—] will be subject to immediate suspension and delisting procedures if:

(i) [T] the aggregate market value or principal amount of publicly-held bonds is less than \$1,000,000, or

(ii) [T] the issuer is not able to meet its obligations on the listed debt securities.

Bonds are not subject to the procedures outlined in Paras. 802.02 and 802.03.

Preferred Stock, Guaranteed Railroad Stock and Similar Issues[-] will be subject to immediate suspension and delisting procedures if:

(i) the [A] aggregate market value of publicly-held shares is less than \$2,000,000, or

(ii) the number of [P] publicly-held shares is less than 100,000.

These types of securities are not subject to the procedures outlined in Paras. 802.02 and 802.03.

(C) In order [T] to be considered in conformity with continued listing standards pursuant to Paras. 802.02 and 802.03, a company that is determined to be below compliance under this continued listing criterion must do one of the following:

(i) [R]eestablish both its market capitalization and its stockholders' equity to the [\$50,000,000] \$75,000,000 level, or

(ii) [A]chieve average global market capitalization over a consecutive 30 trading-day period of at least [\$100,000,000] \$150,000,000, or

(iii) [A]chieve average global market capitalization over a consecutive 30 trading-day period of [\$60,000,000] \$90,000,000, with either (x) stockholders' equity of at least [\$40,000,000] \$60,000,000, or (y) an increase in stockholders' equity of at least [\$40,000,000] \$60,000,000 since the company was notified by the Exchange that it was below continued listing standards.

(D) *In order to be deemed in conformity with continued listing standards pursuant to paras. 802.02 and 802.03, [A] a company that is determined to be below compliance under this continued listing criterion must either:*

(i) reestablish both its market capitalization and its revenues to the applicable amounts [to be considered in conformity with continued listing standards pursuant to paras. 802.02 and 802.03], or

(i) qualify as an original listing under any of the original listing standards.

802.01C Price Criteria for Capital or Common Stock [-]

A Company will be considered to be below compliance standards if the [A]verage closing price of a security is less than \$1.00 over a consecutive 30-trading-day period (E).

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

In its filing with the Commission, the NYSE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange is proposing to introduce a pilot program to amend certain of its minimum numerical

standards for the listing and continued listing of equity securities on the New York Stock Exchange ("Pilot Program"). The Pilot Program will begin January 29, 2004, and expire on July 29, 2004.⁶

The Exchange believes that the proposed Pilot Program will strengthen certain aspects of the minimum original and continued listing standards, while modestly easing the market-cap/revenue test to enable the NYSE to list somewhat younger companies that still meet substantial quantitative thresholds over their operating history. The Exchange staff represents that it has monitored the modest number of companies over the last two years that would have met the market-cap/revenue test as proposed and has found that those companies have performed to a standard that is appropriate for inclusion on the NYSE list. The Exchange believes that its standard in this respect, as in all respects, remains far higher than any other U.S. marketplace.

Currently, section 102.01C of the Listed Company Manual provides that a company must meet one of four specified financial standards in order to qualify to have its equity securities listed. The Exchange is proposing to amend three of these four standards. The Exchange is also proposing to amend Section 103.01B(III), which provides a corresponding numerical standard applicable to international companies.

Section 102.01C(I) currently requires that a company demonstrate pre-tax earnings of \$6.5 million in aggregate for the last three fiscal years, with either a minimum of (a) \$2.5 million in earnings in the most recent fiscal year and \$2 million in each of the preceding two years; or (b) \$4.5 million in earnings in the most recent fiscal year, with positive amounts in each of the preceding two years. The Exchange is proposing to strengthen this standard and also to simplify it by eliminating the current two-tiered structure. As proposed, the "Earnings Test" would require that companies demonstrate pre-tax earnings of \$10 million in aggregate for the last three fiscal years. It would also require that the company demonstrate positive results in all three of the years tested with a minimum of \$2 million in earnings in each of the preceding two years.

⁶ The NYSE has represented that it will notify listed companies of the Pilot Program by e-mail and by posting on its Web site. Telephone conversation between Noreen M. Culhane, Executive Vice President, Corporate Listings and Compliance, NYSE, Annemarie Tierney, Assistant General Counsel, NYSE, Florence Harmon, Senior Special Counsel, NYSE, Division, Commission, and Susie Cho, Special Counsel, Division, Commission, on January 21, 2004.

Section 102.01C(II) currently requires that a company demonstrate market capitalization of at least \$500 million and revenues of at least \$100 million over the most recent 12-month period. Provided that these thresholds are met, a company with operating cash flows of at least \$25 million in aggregate for the last three fiscal years with positive amounts in each of the three fiscal years would qualify for listing. Section 102.01C(III) currently requires that companies demonstrate (a) market capitalization of at least \$1 billion; and (b) revenues of at least \$100 million in the most recent fiscal year. Because both of these tests are valuation and revenue-based, the Exchange proposes to consolidate them into one test with two alternative subsections. One of these sections of the proposed "Valuation/Revenue Test" would incorporate the existing requirements of Section 102.01C(II) as the "Valuation/Revenue with Cash Flow Test," with no change to the current thresholds.⁷ The other section would incorporate the existing requirements of Section 102.01C(III) as the "Pure Valuation/Revenue Test." In addition, the Exchange proposes to amend the current thresholds of Section 102.01C(III) to require that companies demonstrate (a) market capitalization of at least \$750 million; and (b) revenues of at least \$75 million during the most recent fiscal year.⁸ The Exchange staff states that it is modestly lowering this listing standard, because it has monitored the number of companies over the last two years that would have met the Pure Valuation/Revenue test as NYSE proposes to modify it and has found that those companies have performed to a standard that is appropriate for inclusion on the NYSE list.

The Exchange is also proposing to make corresponding restructuring changes to Section 103.01B, which sets out minimum numerical standards for non-U.S. companies. The Exchange also proposes to amend the numeric thresholds of Section 103.01B(III) in

⁷ The NYSE has represented that in evaluating companies for listing pursuant to existing Section 102.01C(II), it has always analyzed a company's "global" market capitalization. Thus, the standards for the proposed "Valuation/Revenue with Cash Flow Test" clarify current NYSE practice. Telephone conversation between Noreen M. Culhane, Executive Vice President, Corporate Listings and Compliance, NYSE, Annemarie Tierney, Assistant General Counsel, NYSE, Florence Harmon, Senior Special Counsel, Division, Commission, and Susie Cho, Special Counsel, Division, Commission, on January 21, 2004.

⁸ The current thresholds require: (a) A global market capitalization of \$1 billion; and (b) revenues of at least \$100 million. Section 102.01C(III) of the Manual.

accordance with the amendments proposed for Section 102.01C(III).

In addition, the Exchange is proposing to restructure and amend the numerical continued listing standards set out in Section 802.01B. Section 802.01B currently applies to companies that fall below any of the following criteria: (i) Average global market capitalization over a consecutive 30 trading-day period is less than \$50,000,000 and total stockholders' equity is less than \$50,000,000; (ii) average global market capitalization over a consecutive 30 trading-day period is less than \$15,000,000; or (iii) for companies that qualified for original listing under the "global market capitalization" standard: (a) Average global market capitalization over a consecutive 30 trading-day period is less than \$500,000,000 and total revenues are less than \$20,000,000 over the last 12 months (unless the resultant entity qualifies as an original listing under one of the other original listing standards); or (b) average global market capitalization over a consecutive 30 trading-day period is less than \$100,000,000.

The Exchange proposes to amend these thresholds and to specifically relate the continued listing standards of Section 802.01B to the original listing standards of Section 102.01C used to qualify a company for listing. Companies that are listed under the proposed "Earnings Test" will be considered to be below compliance if (a) average global market capitalization over a consecutive 30 trading-day period is less than \$75,000,000 and, at the same time, total stockholders' equity is less than \$75,000,000; or (b) average global market capitalization over a consecutive 30 trading-day period is less than \$25,000,000. These levels have been increased in the proposal to reflect marketplace expectations of those companies deemed suitable for continued listing.

A company that qualifies to list under the proposed "Valuation/Revenue with Cash Flow Test" will be considered to be below compliance standards if (a) average global market capitalization over a consecutive 30 trading-day period is less than \$250,000,000 and, at the same time, total revenues are less than \$20,000,000 over the last 12 months (unless the company qualifies as an original listing under one of the other original listing standards); or (b) average global market capitalization over a consecutive 30 trading-day period is less than \$75,000,000.⁹

⁹ Previously, NYSE required \$500,000,000 average global market capitalization over a

A company that qualifies to list under the proposed "Pure Valuation/Revenue Test" will be considered to be below compliance standards if (a) average global market capitalization over a consecutive 30 trading-day period is less than \$375,000,000 and, at the same time, total revenues are less than \$15,000,000 over the last 12 months (unless the resultant entity qualifies as an original listing under one of the other original listing standards); or (b) average global market capitalization over a consecutive 30 trading-day period is less than \$100,000,000.¹⁰

The Exchange also proposes to clarify that it is the continued listing standards applicable to the proposed Earnings Test that will apply to companies that listed under the Affiliated Company Standard in circumstances where such listed company's parent or affiliated company no longer controls the listed company or such listed company's parent or affiliated company falls below the continued listing standards applicable to the parent or affiliated company. In addition, the Exchange proposes to increase the continued listing criteria for funds, REITs and limited partnerships from \$15 million to \$25 million with a corresponding increase to the notification threshold from \$25 million to \$35 million.

Companies that fall below the foregoing minimum standards may be permitted a period of time to return to compliance, in accordance with the procedures specified in Sections 802.02 and 802.03 of the Manual. As a general matter, companies must reestablish the level of market capitalization (and, if applicable, shareholder's equity) specified in the continued listing standard that the company fell below. However, with respect to the current requirements of Section 802.01B(I) that a company reestablish both its market capitalization and its stockholders' equity to the \$50,000,000 level, footnote (C) to Section 802.01B provides several alternatives. Currently, the footnote specifies that to return to conformity, a company must do one of the following: (a) Reestablish both its market capitalization and its stockholders' equity to the \$50,000,000 level; (b) achieve average global market capitalization over a consecutive 30 trading-day period of at least \$100,000,000; or (c) achieve average global market capitalization over a consecutive 30 trading-day period of

consecutive 30 trading-day period and total revenues of \$20,000,000; or \$100,000,000 average global market capitalization over a 30 trading-day period. Section 802.01B(iii) of the Manual.

¹⁰ *Id.*

\$60,000,000, with either (x) stockholders' equity of at least \$40,000,000, or (y) an increase in stockholders' equity of at least \$40,000,000 since the company was notified by the Exchange that it was below continued listing standards. The Exchange proposes to increase these thresholds to require that a company (a) reestablish both its market capitalization and its stockholders' equity to the \$75,000,000 level; (b) achieve average global market capitalization over a consecutive 30 trading-day period of at least \$150,000,000; or (c) achieve average global market capitalization over a consecutive 30 trading-day period of \$90,000,000, with either (x) stockholders' equity of at least \$60,000,000, or (y) an increase in stockholders' equity of at least \$60,000,000 since the company was notified by the Exchange that it was below continued listing standards.

The Exchange has also considered how to transition the above-described changes to the continued listing standards. Sections 802.02 and 802.03 provide that, with respect to a company which is determined to be below continued listing standards a second time within twelve months of successful recovery from previous non-compliance, the Exchange will examine the relationship between the two incidents of falling below continued listing standards and re-evaluate the company's method of financial recovery from the first incident. The Exchange may then take appropriate action, which, depending upon the circumstances, may include truncating the normal procedures for reestablishing conformity with the continued listing standards or immediately initiating suspension and delisting procedures. For those companies that are within such a twelve-month period and would be deemed to be below continued listing standards as a direct result of the approval of the amendments proposed in this filing, the Exchange does not intend to truncate the normal procedures, or immediately initiate suspension and delisting, solely on the basis of the proposed increase to the current continued listing standards.

For those companies that are currently below the continued listing standards, the Exchange intends to allow them to complete their applicable follow up procedures and plan for return to compliance as provided in sections 802.02 and 802.03 ("Plan"). If, at the end thereof, such companies are compliant with the continued listing standards for which they were originally notified, but below the increased requirements set forth above, the

Exchange will grant them an opportunity to present an additional business plan advising the Exchange of definitive action the company has taken, or is taking, that would bring the company into conformity with the increased requirements within a further 12 months.¹¹ In addition, if a company completes its currently applicable follow up procedures and Plan and is not compliant at that time with the continued listing standards for which they were originally notified, but is above the increased requirements set forth above, the Exchange will consider that company to be in conformity with the continued listing standards.

Finally, the Exchange is proposing additional minor technical changes to Sections 102.02C, 103.01B, 802.01B and 802.01C of the Manual.

2. Statutory Basis

The Exchange believes that the basis under the Act for this proposed rule change is the requirement under section 6(b)(5) of the Act¹² that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

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

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

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

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, including whether the proposed rule change is consistent with the Act. Persons making written submissions

¹¹ As of January 20, 2004, there are 10 companies operating pursuant to a NYSE approved business plan. These plans expire at various times throughout the balance of 2004. Under the proposed transition period, these companies could remain listed up to maximum of 22 months from the approval date of this filing, subject to ongoing monitoring and review. Telephone conversation between Annemarie Tierney, Assistant General Counsel, NYSE, Glenn Tyranski, Vice President, Financial Compliance, NYSE, and Susie Cho, Special Counsel, Division, Commission, on January 20, 2004.

¹² 15 U.S.C. 78f(b)(5).

should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*.

All comment letters should refer to File No. SR-NYSE-2003-43. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should be submitted by February 26, 2004.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹³ In particular, the Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act,¹⁴ which requires that the rules of an exchange be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national securities system, and protect investors and the public interest.

The amendments to section 102.01C(I), the "Earnings Test," would require that companies demonstrate pre-tax earnings of \$10 million in aggregate for the last three fiscal years. The proposed "Earnings Test" would also require that the company demonstrate positive results in all three of the years tested with a minimum of \$2 million in earnings in each of the preceding two years. The Commission believes that

¹³ In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁴ 15 U.S.C. 78f(b)(5).

these amendments are consistent with the Exchange Act.

The amendments to the current thresholds of section 102.01C(III) would require, in order to qualify for listing under the "Pure Valuation/Revenue Test," that companies demonstrate (a) market capitalization of at least \$750 million; and (b) revenues of at least \$75 million during the most recent fiscal year. The Commission believes that it is reasonable for the Exchange, based upon its experience, to determine that the companies that meet this proposed standard would be appropriate for inclusion on the NYSE list. The Commission notes that even with the proposed changes, the NYSE's listing standard still remains substantially higher than comparable listing standards of other marketplaces.¹⁵

In addition, the Commission believes that the amendments to the numerical continued listing standards in Section 802.01B should simplify and clarify the continued listing standards, by relating the continued listing standards to the original listing standards set forth in section 102.01C. The Commission believes that it is reasonable for the Exchange, based upon its experience, to determine that the proposed categories of listing standards reflect marketplace expectations of those companies deemed suitable for continued listing. The Commission notes that, in general, the continued listing standards reflect the proportional adjustments in the initial listing standards.

Finally, the Exchange has explained how it intends to transition the proposed amendments to the continued listing standards. For those companies that are currently within a twelve-month period following their recovery from previous non-compliance (pursuant to a Plan) advising the Exchange of action the company has taken, or is taking that would bring it into conformity with continued listing standards with 18 months), and would fall below continued listing standards as a direct result of the approval of the proposal, the Exchange does not intend to truncate the normal procedures or immediately initiate suspension and delisting, solely on the basis of the proposed increase to the current continued listing standards.

The Exchange intends to allow companies that are currently below the continued listing standards to complete their applicable follow-up procedures and Plan for return to compliance, as

¹⁵ For example, one listing standard on Amex requires, among other things, \$75 million market capitalization, or \$75 million in total assets and revenues (in the last year or in 2 of the last 3 years). See *Amex Company Guide*, Section 101(d).

provided in sections 802.02 and 802.03. If, at the end thereof, such companies are compliant with the continued listing standards for which they were originally notified, but below the increased requirements proposed herein, the Exchange would grant them an opportunity to present an additional business plan advising the Exchange of definitive action the company has taken, or is taking, that would bring the company into conformity with the increased requirements within a further 12 months. In addition, if a company completes its currently applicable follow-up procedures and Plan and is not compliant at that time with the continued listing standards for which it was originally notified, but is above the increased requirements set forth above, the Exchange would consider that company to be in conformity with the continued listing standards.

The Commission believes that the Exchange's transition policies are reasonable and consistent with the Act. The Commission notes that these policies should impact few companies.¹⁶ The Commission, however, expects that the Exchange will follow closely the progress of companies that are currently in their Plan period or subsequent 12-month period, to ensure that these companies will attain the proposed continued listing standards. The Commission notes that, pursuant to section 802.02, the Exchange has the discretion to suspend trading in any security and apply to the Commission for delisting, when the Exchange deems it necessary for the protection of investors.

The NYSE has requested that the Commission find good cause for approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of notice in the **Federal Register**. The Commission believes that it is reasonable to grant accelerated approval to allow for the efficient administration of the Exchange's original and continued listing programs as promptly as possible. The Commission notes that the listing standard of the NYSE that is being modestly lowered, as proposed, would remain substantially higher than other comparable listing standards of other marketplaces.¹⁷ In addition, the Commission notes that the amended original and continued listing standards will be in effect only as a pilot program for a six-month period. Accordingly, the Commission finds good cause, pursuant to section 19(b)(2) of the Act,¹⁸ for

accelerated approval of the proposed rule change, as amended.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,¹⁹ that the proposed rule change (SR-NYSE-2003-43), as amended, is hereby approved on an accelerated basis, as a six-month pilot, scheduled to expire on July 29, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁰

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04-2335 Filed 2-4-04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49138; File No. SR-PCX-2003-36]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. Relating to the Composition of Its Audit Committee

January 28, 2004.

On July 14, 2003, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change that would amend its rule regarding the PCX's Audit Committee. On August 21, 2003, PCX submitted by facsimile Amendment No. 1 to the proposed rule change.³ The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on September 29, 2003.⁴ The Commission received no comments on the proposal.

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

exchange⁵ and, in particular, the requirements of Section 6(b)(5) of the Act.⁶ Section 6(b)(5) requires, among other things, that the rules of the exchange be designed to prevent fraudulent and manipulative acts, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission notes that the proposed rule change specifies that all members of PCX's Audit Committee must be Public Governors. The PCX Constitution requires "Public Governors" to be representatives of the public and not a broker or dealer or affiliated with a broker or dealer.⁷ Previously, Audit Committee members were not required to be Public Governors. Furthermore, the proposed rule change requires that at least one member of the Audit Committee have accounting or financial management expertise, as the Board of Governors interprets such qualification in its business judgment. The Commission believes that the proposed change should help improve the Exchange's governance structure by requiring that all members of the Audit Committee be Public Governors and that at least one of those members have accounting or financial management expertise. In this way, the independence and effectiveness of the Audit Committee should be enhanced. Therefore, the Commission finds that the proposed rule change is consistent with the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁸ that the proposed rule change (SR-PCX-2003-36), as amended by Amendment No. 1, be, and hereby is, approved.

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

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04-2333 Filed 2-4-04; 8:45 am]

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¹⁹ 15 U.S.C. 78s(b)(2).

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Steven B. Maitlin, Senior Counsel, Regulatory Policy, PCX, to Leah Mesfin, Attorney, Division of Market Regulation, Commission, dated August 21, 2003 ("Amendment No. 1"). In Amendment No. 1, the Exchange replaced the term "independent Governors" in the proposed rule text with "Public Governors."

⁴ Securities Exchange Act Release No. 48500 (September 17, 2003), 68 FR 56030 (September 29, 2003).

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

⁶ 15 U.S.C. 78f(b)(5).

⁷ See PCX Constitution, Article II, Section 1(a).

⁸ 15 U.S.C. 78s(b)(2).

⁹ 17 CFR 200.30-3(a)(12).

¹⁶ See *supra* n.11.

¹⁷ See *supra* note 15.

¹⁸ 15 U.S.C. 78s(b)(2).