

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-49443; File No. SR-NYSE-2004-15)

March 18, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to a Pilot Program to Review Minimum Numerical Continued Listing Standards

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 16, 2004, the New York Stock Exchange, Inc. (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The NYSE is proposing to suspend its current six-month pilot program relating to Section 802.01B of the Exchange’s Listed Company Manual (the “Manual”) regarding the minimum numerical continued listing standards. Proposed new language is in italics, and proposed deletions are in [brackets].

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

## **Listed Company Manual**

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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:

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#### **802.01B Numerical Criteria for Capital or Common Stock**

A company that falls below the criteria applicable to 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) 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.

(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) 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) 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 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.

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When applying the market capitalization test in any of the above 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.

Funds, REITs and Limited Partnerships will be subject to immediate suspension and delisting procedures if the average market capitalization of the entity over 30 consecutive trading days is below \$25,000,000. In addition, a Fund is subject to immediate suspension and delisting if it ceases to maintain its closed-end status. 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 \$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) the aggregate market value or principal amount of publicly-held bonds is less than \$1,000,000, or

(ii) 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 aggregate market value of publicly-held shares is less than \$2,000,000, or

(ii) the number of 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 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) reestablish both its market capitalization and its stockholders' equity to the \$75,000,000 level, or

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

(iii) 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.

(D) In order to be deemed 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 either:

(i) reestablish both its market capitalization and its revenues to the applicable amounts, or

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

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 (C); or

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:

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) (D); or

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

When applying the market capitalization test in any of the above three 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 over 30 consecutive trading days is below \$15,000,000 or (2) in the case of a Fund, it ceases to maintain its closed-end status, and in the case of a REIT, 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 and 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 -

- The aggregate market value or principal amount of publicly-held bonds is less than \$1,000,000
- The issuer is not able to meet its obligations on the listed debt securities.

Preferred Stock, Guaranteed Railroad Stock and Similar Issues-

- Aggregate market value of publicly - held shares is less than.... \$2,000,000  
Publicly- held shares is less than.....100,000

(C) 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 this continued listing criterion must do one of the following:

(i) Reestablish both its market capitalization and its stockholders' equity to the \$50,000,000 level, or

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

(iii) Achieve average global market capitalization over a consecutive 30 trading-day period of \$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.

(D) A company that is determined to be below this continued listing criterion must reestablish both its market capitalization and its revenues to be considered in conformity with continued listing standards pursuant to paras. 802.02 and 802.03.

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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 the basis for, the proposed rule change, as amended, 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 Amex 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

On January 29, 2004, the Commission approved a pilot program amending certain of the minimum numerical standards for the listing and continued listing of equity securities on the

Exchange (“Pilot Program”).<sup>5</sup> At that time, the Exchange believed that the impact of the Pilot Program would be to strengthen certain aspects of the minimum original and continued listing standards, while modestly easing its 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 is proposing to suspend the portion of the Pilot Program relating to the numerical continued listing standards set out in Section 802.01B of the Manual. Under the previous requirements, Section 802.01B applied to companies that fell 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.

Under the Pilot Program, companies that are listed under the Section 102.01C(I) “Earnings Test” are 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

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<sup>5</sup> See Securities Exchange Act Release No. 49154 (January 29, 2004), 69 FR 5633 (February 5, 2004)(SR-NYSE-2003-43). The Pilot Program was scheduled to expire on July 29, 2004.

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.

A company that qualifies to list under the Section 102.01C(II)(a) “Valuation/Revenue with Cash Flow Test” is 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.

A company that qualifies to list under the Section 102.01C(II)(b) “Pure Valuation/Revenue Test” is 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.

Under the Pilot Program, companies that fall below the foregoing minimum standards are 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, the previous requirements of Section 802.01B(I) that a company reestablish both its market capitalization and its stockholders' equity to the \$50,000,000 level provided several alternatives, specifying 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 \$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. Under the Pilot Program, companies are required to (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 Pilot Program provides a transition period for companies that were below compliance under the previous standards at the time the Pilot Program was approved, granting 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 Pilot Program requirements within a further 12 months from the end of their previous plan. No transition period was provided, however, for companies that were in compliance under the previous standards but not in compliance with the with the Pilot Program standards at the time the Pilot Program was approved.

The Exchange had requested, and the Pilot Program was approved, by the Commission on an accelerated basis. The Exchange represents that there was no opportunity for listed

companies to review and comment on the Pilot Program requirements prior to the date compliance was required. A number of the listed companies that found themselves not in compliance with the Pilot Program standards as of the date of approval have expressed significant dismay at the automatic application of the new standards with no public notice. The Exchange is aware that the Commission has received two comment letters expressing this sentiment,<sup>6</sup> in addition to the numerous oral communications by companies directed to the Exchange staff. In order to address these concerns, the Exchange proposes to suspend the portions of the Pilot Program relating to Section 802.01B. The Exchange intends, instead, later to file a proposed rule change to adopt the requirements of the Pilot Program relating to 802.01B with the Commission for public comment on a non-accelerated timeframe.<sup>7</sup>

The Pilot Program, however, will continue without change with respect to Sections 102.01C and 103.01B. The Exchange will also continue the Pilot Program's non-substantive change to the language of Section 802.01C.

## 2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act,<sup>8</sup> in general, and the provisions of Section 6(b)(5) of the Act,<sup>9</sup> in

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<sup>6</sup> See Letters to Jonathan G. Katz, Secretary, Commission, from W. Randy Eaddy, Kilpatrick Stockton L.L.P., dated March 11, 2004, and Kenneth A. Hoogstra, von Briesen & Roper, s.c., dated February 25, 2004.

<sup>7</sup> If the NYSE plans to implement the Pilot Program as initially proposed in SR-NYSE-2003-43 on a permanent basis, the Commission expects the NYSE to file all aspects of the Pilot Program (which include the Pilot Program's revisions to the NYSE initial and continued listing standards) for full notice and comment pursuant to Section 19(b) of the Act.

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

<sup>9</sup> 15 U.S.C. 78f(b)(5).

particular, in that it is 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 a national market system, 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, as amended, 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

No written comments were solicited or received with respect to the proposed rule change, as amended.

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

Because the foregoing proposed rule change, as amended, does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>10</sup> and Rule 19b-4(f)(6)<sup>11</sup> thereunder.<sup>12</sup> At any time within 60 days of the filing of the proposed rule change, as amended, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection

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<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date or such shorter period as designated by the Commission.

of investors, or otherwise in furtherance of the purposes of the Act.

The NYSE has requested that the Commission waive the five-day pre-filing notice and the 30-day operative delay. The Commission believes that waiving the five-day pre-filing notice and the 30-day operative delay is consistent with the protection of investors and the public interest. Waiver of the operative date will allow the Exchange to suspend immediately its effective Pilot Program relating to minimum continued numerical listing standards for qualification of domestic and international companies. The Commission notes that suspension of the Pilot Program for minimum continued numerical listing standards would alleviate the concerns of commenters who believed that they were given inadequate notice of the effectiveness of the Pilot Program.<sup>13</sup> For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>14</sup>

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. 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-2004-15. 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 hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with

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<sup>13</sup> See infra note 6.

<sup>14</sup> For purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-NYSE-2004-15 and should be submitted by [insert date 21 days from the date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).