

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-49917, File No. SR-NYSE-2004-20)

June 25, 2004

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc., to Change Its Original and Continued Quantitative Listing Standards

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 April 13, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On May 20, 2004, NYSE submitted Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The NYSE is proposing to amend Sections 102.01C, 103.01B, 802.01B, and 802.01C of the NYSE's Listed Company Manual regarding the minimum numerical original and continued listing standards. Proposed new language is italicized; deletions are bracketed.⁴

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¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated May 19, 2004 ("Amendment No. 1"). Amendment No. 1 replaced and superseded the original filing in its entirety.

⁴ The NYSE has agreed to amend the proposed rule change to make technical corrections to the proposed rule text. Telephone conversation between Annemarie Tierney, Assistant General Counsel, NYSE, and Susie Cho, Special Counsel, Division, Commission, on May 24, 2004.

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 acquirer, 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 acquirer. 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.

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[(IV) Affiliated Company Standard

(1) Market capitalization of \$500,000,000 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

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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:

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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]reestablish both its market capitalization and its stockholders' equity to the [~~\$50,000,000~~] \$75,000,000 level, or

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

(iii) [A]achieve 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

(ii) 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]average 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 Exchange 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 amendments to certain of its minimum numerical standards for the listing and continued listing of equity securities on the NYSE. On January 29, 2004, the Commission approved these proposed amendments sought by the NYSE on a pilot program basis (the "Pilot Program").⁵ The Pilot Program provided a transition period for companies that were below compliance under the previous continued listing 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 12 months of the end of their previous plan. No transition period was provided, however, for companies that were in compliance with the previous standards but not in compliance with the Pilot Program standards at the time the Pilot Program was approved.

At the Exchange's request, the Commission approved the Pilot Program on an accelerated basis. The Exchange now believes that there was no opportunity for listed companies to review and comment on the Pilot Program requirements prior to the date compliance was required. The NYSE notes that a number of the listed companies that did not comply with the Pilot Program standards as of the date of approval expressed dismay at the automatic application of the new

⁵ See Securities Exchange Act Release No. 49154 (January 29, 2004), 69 FR 5633 (February 5, 2004) (approving File No. SR-NYSE-2003-43).

standards with no public notice.⁶ In order to address these concerns, the Exchange suspended the portions of the Pilot Program relating to the continued listing standards of Section 802.01B of the NYSE's Listed Company Manual.⁷ In File No. SR-NYSE-2004-15, the Exchange noted its intention to file with the Commission a proposed rule change, without any request for accelerated approval, allowing a full notice-and-comment period regarding the requirements of the Pilot Program relating to Section 802.01B.⁸ File No. SR-NYSE-2004-15 did not, however, amend the Pilot Program with respect to Sections 102.01C and 103.01B of the NYSE's Listed Company Manual concerning original minimum listing standards or the Pilot Program's non-substantive change to the language of Section 802.01C.⁹

The Exchange now seeks permanent approval for the Pilot Program currently in effect with respect to the Exchange's original minimum listing standards and approval of the continued minimum listing standards as initially proposed in File No. SR-NYSE-2003-43. The Exchange represents that it maintains an ongoing dialog with knowledgeable practitioners at investment banks, broker-dealers, and venture capital firms, and adjusts its listing standards periodically to ensure that the standards recognize and reflect current market conditions and to allow the Exchange to continue to attract quality companies. The Exchange represents, furthermore, that such changes are proposed only after detailed analysis by Exchange staff of how the proposed

⁶ See letters from Kenneth A. Hoogstra, von Briesen & Roper, s.c., to Jonathan G. Katz, Secretary, Commission, dated February 25, 2004, and W. Randy Eaddy, Kilpatrick Stockton LLP, to Jonathan G. Katz, Secretary, Commission, dated March 11, 2004, (commenting on File No. SR-NYSE-2003-43).

⁷ See Securities Exchange Act Release No. 49443 (March 18, 2004), 69 FR 13929 (March 24, 2004) (File No. SR-NYSE-2004-15).

⁸ See id.

⁹ See id.

standards would affect the NYSE list. The NYSE asserts that the proposed amendments will strengthen certain aspects of the minimum original and continued listing standards, while modestly easing the pre-Pilot "Program Market-Cap/Revenue Test" to enable the NYSE to list somewhat younger companies that still meet substantial quantitative thresholds over their operating history. According to the NYSE, Exchange staff monitored the modest number of companies over the last two years that would have met the "Market-Cap/Revenue Test" as the Exchange proposes to modify it and found that those companies have performed to a standard that would be appropriate for inclusion on the NYSE list.

Prior to the Pilot Program, Section 102.01C of the Listed Company Manual provided 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 permanent approval of amendments to three of these four standards that have been in effect under the Pilot Program.¹⁰ The Exchange is also proposing permanent approval of amendments to Section 103.01B(III), which provides a corresponding numerical standard applicable to international companies and have also been in effect under the Pilot Program.

Prior to the Pilot Program, Section 102.01C(I) required 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 earnings in

¹⁰ The "Earnings Test," the "Valuation/Revenue Test" (incorporating in one section the pre-Pilot Program Valuation/Revenue with Cash Flow Test and in another section the Pure Valuation/Revenue Test), or the "Affiliated Company Test." See Securities Exchange Act Release No. 49154 (January 29, 2004), 69 FR 5633 (February 5, 2004) (approving File No. SR-NYSE-2003-43).

each of the preceding two years. Pursuant to the Pilot Program, the "Earnings Test" requires that companies demonstrate pre-tax earnings of \$10 million in aggregate for the last three fiscal years. It also requires that the company demonstrate positive results in all three of the years tested with a minimum of \$2.0 million in earnings in each of the preceding two years. The Exchange believes that these changes strengthen the "Earnings Test" standard and also simplify it by eliminating the current two-tiered structure.

Prior to the Pilot Program, Section 102.01C(II) required 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 were met, a company with operating cash flows of at least \$25 million in aggregate for the last three fiscal years and positive amounts in each of the three fiscal years would have qualified for listing. Section 102.01C(III) required that an issuer 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 now seeks permanent approval to consolidate them into one test with two alternative subsections. One of the sections of the current Pilot Program, the "Valuation/Revenue Test," incorporates the pre-Pilot Program requirements of Section 102.01C(II) as the "Valuation/Revenue with Cash Flow Test" with no change to the previous thresholds. The other section incorporates the pre-Pilot Program requirements of Section 102.01C(III) as the "Pure Valuation/Revenue Test." In addition, the Exchange is proposing to permanently approve the amendments to the thresholds of Section 102.01C(III) that 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. As noted above, the Exchange represents

that its staff has monitored the modest number of companies over the last two years that would have met the Pilot Program's "Pure Valuation/Revenue Test" and found that those companies performed to a standard that is appropriate for inclusion on the NYSE list.

The Exchange is also proposing permanent approval of corresponding restructuring changes to Section 103.01B, which sets out minimum numerical standards for non-U.S. issuers. The Exchange is also proposing permanent approval of changes to the numeric thresholds of Section 103.01B(III) in accordance with changes to Section 102.01C(III).

In addition, the Exchange seeks permanent approval of its suspended Pilot Program restructuring and amending the numerical continued listing standards. Section 802.01B of the Listed Company Manual 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 million and total stockholders' equity is less than \$50 million; or (ii) average global market capitalization over a consecutive 30-trading-day period is less than \$15 million; 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 million and total revenues are less than \$20 million 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 million.

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 list under the Pilot Program's "Earnings Test" or

its predecessor test would be considered to be below compliance if: (a) average global market capitalization over a consecutive 30-trading-day period is less than \$75 million and, at the same time, total stockholders' equity is less than \$75 million; or (b) average global market capitalization over a consecutive 30-trading-day period is less than \$25 million. These levels have been increased in the proposal to reflect marketplace expectations of those companies deemed suitable for continued listing. These levels are lower than the existing "global market capitalization" standard.

Issuers that list under the Pilot Program's "Valuation/Revenue with Cash Flow Test" or its predecessor test would be considered to be below compliance standards if: (a) average global market capitalization over a consecutive 30-trading-day period is less than \$250 million and, at the same time, total revenues are less than \$20 million over the last 12 months (unless the company qualifies as an original listing under one of the other original listing standards);¹¹ or (b) average global market capitalization over a consecutive 30-trading-day period is less than \$75 million.

Issuers that list under the Pilot Program's "Pure Valuation/Revenue Test" or its predecessor test would be considered to be below compliance standards if: (a) average global market capitalization over a consecutive 30-trading-day period is less than \$375 million and, at the same time, total revenues are less than \$15 million 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 \$100 million.

¹¹ These levels are lower than the existing "global market capitalization" standard.

The Exchange also proposes to clarify that, in circumstances where a 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, the continued listing standards applicable to the Pilot Program's "Earnings Test" would apply to companies that originally listed under the Affiliated Company Standard. 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 could 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 Listed Company 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 below which the company fell. 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 million 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 million level; (b) achieve average global market capitalization over a consecutive 30-trading-day period of at least \$100 million; or (c) achieve average global market capitalization over a consecutive 30-trading-day period of \$60 million, with either (x) stockholders' equity of at least \$40 million, or (y) an increase in stockholders' equity of at least \$40 million, since the company was notified by the Exchange that it was below continued listing standards. The

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

The Exchange represents that it has considered how to transition the above-described changes to the continued listing standards and intends to provide a period of 30 trading days from the date of any Commission approval of the proposed amendments until such amendments would become effective.

Sections 802.02 and 802.03 of the Listed Company Manual provide that, with respect to a company which is determined to be below continued listing standards a second time within 12 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 12-month period and who 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 would not intend to truncate or immediately initiate suspension and delisting solely on the basis of the

proposed increase to the current continued listing standards. The Exchange would take into consideration all of the facts and circumstances relating to the company in determining whether to allow such company an opportunity to submit a second plan.

With respect to an issuer currently below the continued listing standards now in force, the Exchange intends to allow it to complete its applicable follow-up procedures and plan for return to compliance as provided in Sections 802.02 and 802.03 of the Listed Company Manual. If, at the end thereof, the issuer is compliant with the continued listing standards about which it was originally notified, but below the increased requirements set forth above, the Exchange would grant it an opportunity to present an additional business plan advising the Exchange of definitive action the issuer has taken, or is taking, that would bring it into conformity with the increased requirements within a further 12 months. In addition, if an issuer were to complete its currently applicable follow-up procedures and plan and were not compliant at that time with the continued listing standards about which it was originally notified, but is above the increased requirements set forth above, the Exchange would consider that issuer to be in conformity with the continued listing standards.

For an issuer that is in compliance with the continued listing standards now in force, but that might be below the continued listing standards proposed herein, the proposed 30-day measurement period prior to effectiveness would allow the Exchange sufficient time to provide early warnings to any issuer that would potentially be below compliance at the end of that period. If, at the end of the 30-trading-day measurement period, an issuer is below the increased requirements set forth above, the Exchange would formally notify the issuer of such non-compliance and provide it with an opportunity to present a business plan within 45 days of that

notification advising the Exchange of definitive action the issuer would take to bring it into conformity with the increased requirements within an 18-month period.

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

2. Statutory Basis

The Exchange believes that the proposed rule change satisfies the requirement under Section 6(b)(5) of the Act¹² that the Exchange's rules be 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 NYSE does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

The NYSE did not solicit or receive written comments on the proposed rule change.

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 the Exchange consents, the Commission will:

¹² 15 U.S.C. 78f(b)(5).

(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, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2004-20 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. All submissions should refer to File Number SR-NYSE-2004-20. 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, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2004-20 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Margaret H. McFarland
Deputy Secretary

¹³ 17 CFR 200.30-3(a)(12).