KILPATRICK STOCKTON LLP
Attorneys at Law

Suite 2800 1100 Peachtree St.
Atlanta GA 30309-4530
t 404 815 6500 f 404 815 6555
www.KilpatrickStockton.com

direct dial 404 815 6587
direct fax 404 541 3186
REaddy@KilpatrickStockton.com

March 11, 2004

VIA EMAIL: rule-comments@sec.gov

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment 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 Minimum Numerical Standards (Release No. 34-49154; File No. SR-NYSE-2003-43)

Dear Mr. Katz:

We are submitting this letter in response to the Commission's request for comments on the above-referenced notice and order granting accelerated approval of the proposed rule change relating to the New York Stock Exchange's numerical listing standards.

The proposed rule altered and, in most cases, increased the numerical listing standards of the New York Stock Exchange (the "Exchange"), both as a matter of initial listing and continued listing on the Exchange. We are not writing to comment on the specific numerical listing standards proposed by the Exchange. However, we are writing to comment on the unusual and accelerated nature of the approval of the continued listing standards. More specifically, we are writing to comment on the manner in which the continued listing standards were proposed for amendment, the apparent secrecy of the proposal process, the short comment period (which purports to have expired on February 26, only three weeks after the publication date in the Federal Register), and the timing with which these amendments have been implemented.

A. Background

On January 29, 2004, the Commission approved the issuance of the above-referenced notice and the accelerated effectiveness of the proposed rule changes on a six-month, so-

called "pilot basis". The notice and order were published in the Federal Register on February 5, 2004, without any press release by either the Commission or the Exchange. Prior to that time, the Exchange had provided no notice that an amendment of its listing standards was being considered. We represent a NYSE-listed company that is potentially affected by the rule change. That company received its first notice about the matter during the week of February 17, when it received a phone call from the Exchange and thereafter received a letter dated "February 10, 2004".

In that phone call and letter, both following the Commission's approval of the pilot program, the Exchange indicated that it would notify listed companies of their status (within five business days of March 15, 2004) if they fall below compliance with the new continued listing standards as of March 15, 2004. For some companies, such new standards include a 30-day market capitalization test for which the calculation will commence on February 15, 2004. The Exchange also indicated that this notification would simultaneously trigger the Exchange's tagging of the trading symbols for the companies' securities with the indicator ".BC", indicating "below compliance". Moreover, the Exchange indicated that affected companies should strongly consider a public announcement of such tagging.

B. Discussion of Concerns

We now know that the Exchange filed the proposed rule change with the Commission on December 22, 2003 and filed amendments thereto on January 19, 2004 and January 23, 2004. However, neither the Exchange nor the Commission publicized these filings or the discussions that were occurring between the Exchange and the Commission. Moreover, potentially affected, then-listed companies were not privately informed by the Exchange of these developments. As a result, listed companies that are being affected by the accelerated effectiveness of these significantly changed, continued listing standards were intentionally left unaware of this impending action.

Moreover, such companies or other concerned parties were given no realistic opportunity to comment on the "proposal" before being impacted by them. In fact, when combined with the Commission's short comment period, the essentially surreptitious nature of these processes gave no effective opportunity to be heard at all, either by the Exchange or the Commission. Additionally, the nature of the so-called "pilot" program structure for implementing the continued listing standards component of the "proposal" means that, for several currently compliant companies, it was a fait accompli, rather than a proposal, when first published in the Federal Register.

In its proposal to the Commission, the Exchange addresses its transition policies with respect to companies that were below compliance with then-applicable listing standards (and

operating under an Exchange approved rehabilitation business plan) prior to February 5, 2004. However, most ironically, the proposal does not address tempering the negative effects of the accelerated rule change on listed companies that were not below compliance with the listing standards in effect prior to February 5, 2004, but that would be below compliance if the revised numerical listing standards were retroactively applied to them.

Contrary to the Commission's statement that approving the proposal on an accelerated basis would achieve the goal of protecting investors, the immediate effectiveness of the pilot program to listed companies that were in compliance on February 5, 2004, will potentially harm investors in those companies if their securities are tagged as being "below compliance" on an essentially retroactive basis. Such tagging may lead (indeed, it is likely to do so) to trading in the stock at lower prices that bear no relationship to intrinsic value of the subject company or to its recent performance or financial condition. Of course, if the Exchange were to abandon or modify the proposed rule at the end of the pilot period, great harm may have already been suffered by some of these companies.

The Commission's customary processes of providing advance notice to affected or concerned parties, and a meaningful opportunity for them to provide comments, before effectiveness of proposed rule changes are intended to avoid such consequences. These processes and historical practice properly recognize that an agency might not have fully considered all relevant factors as an initial matter.

We do not believe that the Commission desires or intends such a severe result for currently compliant listed companies. We see no reason in logic for it to be so, and it is unfair to such companies, to say the least.

C. Requests and Recommendations

We urge the Commission to require the Exchange to avoid a de facto retroactive application of the new continued listing standards to currently compliant companies. At a minimum, this component of the new standards should not be made applicable to listed companies who were in compliance with the continued listing standards that were in effect prior to February 5, 2004, until the end of the pilot period, during which time the Commission should continue to accept comments about that component of the proposed rule. More appropriately, a reasonable transition period should be imposed, consistent with the Commission's historic practices for significant new requirements, for the continued listing standards. A reasonable timetable for application of that component would be January 1, 2005, or the end of such a company's next fiscal year following the end of the pilot period.

We hope the Commission will consider these comments on the proposed rule, notwithstanding the expiration of the announced comment period, in light of the unusual circumstances described above. We would be please to discuss any comments the Commission may have with respect to this letter. Any questions about this letter may be directed to the undersigned at (404) 815-6587 in our Atlanta office.

Very truly yours,

KILPATRICK STOCKTON LLP

By:_____
W. Randy Eaddy