

February 25, 2004

VIA E-MAIL: rule-comments@sec.gov

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: Comments on Change in NYSE Continued Listing Standards
File No. SR-NYSE-2003-43

Dear Mr. Katz:

We are writing this letter to comment on the changes to the continued listing standards of the New York Stock Exchange (Sections 802.00, et seq., of the NYSE Listed Company Manual), which were approved by the SEC on a six-month pilot basis on January 29, 2004, and published in the Federal Register on February 5, 2004. Although the revisions to the NYSE's Listed Company Manual lowered the continued listing requirements for larger companies traded on the NYSE (e.g., the requirements for certain companies were lowered from \$500 million in market capitalization and \$20 million in revenues to \$375 million and \$15 million, respectively), the continued listing requirements for smaller companies traded on the NYSE were raised significantly. Prior to the revisions, a company could be delisted if its global market capitalization and total stockholders' equity were both less than \$50 million. Under the new standards, the market capitalization and total stockholders' equity requirements were raised to \$75 million.

For the reasons discussed below, we oppose the portion of the revisions to the continued listing standards that raise the market capitalization and stockholders' equity requirements to \$75 million. We also request that the SEC take immediate action to reverse its approval of the revised standards until all interested parties have had an opportunity to comment.

COMPANIES NEGATIVELY AFFECTED BY THE REVISIONS WERE NOT PROVIDED WITH NOTICE OR AN OPPORTUNITY TO COMMENT

As noted above, the revisions to the NYSE's listing standards first appeared in the Federal Register on February 5, 2004, after they had been approved by the NYSE. Although the NYSE apparently submitted the proposed changes to the SEC on December 19, 2003, to our knowledge, the NYSE did not notify listed companies of the proposed changes, nor were the proposed changes made public by the SEC at any time prior to publication in the February 5, 2004, Federal Register. In the Federal Register notice, the NYSE acknowledged that it had neither solicited nor received comments on the proposed

rule change. Moreover, the SEC granted accelerated approval of the proposed changes, noting that the “amended . . . continued listing standards will be in effect only as a pilot program for a six-month period.”

The fact that the revisions have only been approved for six months is of little comfort to companies that were in compliance with the prior \$50 million listing standards but fall below the amended \$75 million listing standards. Such companies have already been notified by the NYSE that they are below the amended listing standards, and that the NYSE will seek to delist them once 30 trading days have passed from the date the amendments were approved by the SEC. For most or all of such companies, the contact from the NYSE informing them that the NYSE will seek to delist them was the first time they learned that a revision to the listing standards had been proposed, let alone approved. Some long-time listed companies feel betrayed by the NYSE’s decision, and even more so by the SEC’s approval of the NYSE’s proposal without any opportunity to comment. What the NYSE characterizes as a “pilot” will instead be a *fait accompli* for many companies by the end of the six month period, the effects of which will be difficult (if not impossible) to reverse.

THE REVISIONS TO THE NYSE’S CONTINUED LISTING STANDARDS ARE NOT IN THE BEST INTERESTS OF THE PUBLIC OR THE SHAREHOLDERS OF COMPANIES AFFECTED BY THE CHANGE

Under Section 6(b)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(b)(5)), the rules of an exchange must 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. In our opinion, the NYSE has not adequately explained how a 50% increase in the market capitalization and stockholders’ equity requirements for continued listing satisfies these standards.

To the contrary, the increases are not in the best interests of the public or the shareholders of companies impacted by the change. These companies are already devoting significant resources toward compliance with the requirements of the Sarbanes-Oxley Act of 2002 (the “Act”), especially the internal control requirements of Section 404 of the Act. Requiring such companies to devote additional resources to satisfy the revised listing standards, or to seek an alternative marketplace for their publicly traded securities, is particularly burdensome at this time.

Moreover, one of the main concerns behind the Act was the emphasis by certain companies on manufacturing short-term, unsustainable increases in stock price at the expense of the long-term growth and health of the company. The NYSE rule change, by requiring companies previously in compliance with its listing standards to develop a plan to increase their market capitalization and/or stockholders’ equity by as much as 50% in 18 months in order to remain listed, will push some companies to sacrifice long-term strategic plans in favor of such short-term growth. By encouraging the behavior the Act seeks to prevent, the change in the listing standards undermines the Act.

The only stated reason for increasing the market capitalization and stockholders’ equity requirements is “to reflect marketplace expectations of those companies deemed suitable for listing.” In our opinion, this conclusory statement is not a sufficient reason to increase the NYSE’s market capitalization and stockholders’ equity requirements. First, the NYSE has not cited any studies or surveys indicating that

such “marketplace expectations” actually exist. Second, it is important to consider this statement in light of the NYSE’s prior changes in its listing standards, which occurred in 1999. At that time, the major market indices were climbing toward all-time record highs, and many companies were seeing significant increases in market capitalization and/or shareholder equity. In response to these market conditions, it made sense for the NYSE to adopt the \$50 million market capitalization/stockholders’ equity requirements for continued listing (prior to the change, the NYSE had a requirement that listed companies maintain aggregate market value of publicly traded shares of \$8 million). However, since then, numerous factors contributed to a significant market downturn. Many companies suffered a serious decline in market capitalization and stockholders’ equity as a result. Moreover, the downturn in the market contributed to significant unfunded pension liabilities, which further eroded stockholders’ equity. There clearly has not been a market rise commensurate with the 50% increase in the NYSE’s market capitalization/stockholders’ equity requirements; indeed, the broader markets have only recently begun to reach the 1999 levels. Based on the above facts, it is hard to understand the NYSE’s position that “marketplace expectations” have rendered companies that were deemed suitable for listing under the updated 1999 listing standards no longer suitable for listing today.

In light of the burdens that the revised listing standards will place on affected listed companies and their shareholders, it is incumbent on the NYSE to proffer sound reasons for increasing the market capitalization/stockholders’ equity requirements for continued listing. We do not believe that the NYSE’s stated reasons are sufficient to justify these changes to the listing standards.

THE CONTINUED LISTING STANDARDS SHOULD BE FURTHER AMENDED TO ALLOW FOR AN EXTENDED COMPLIANCE PERIOD FOR COMPANIES IN COMPLIANCE WITH PRIOR STANDARDS

The revised listing standards do not grandfather or otherwise provide an extended compliance period for companies that were in compliance with the listing standards prior to their revision. In fact, companies that were below the prior listing standards are in some instances treated more favorably than companies that complied with the prior listing standards. Companies that were following an 18-month plan for compliance with the prior listing standards are permitted to finish their 18-month plan in order to come into compliance with the prior standards, and then are afforded an additional 12 months to come into compliance with the new standards. Companies that had been in compliance with the prior listing standards all along may be required to come into compliance with the new standards sooner, as they will only have 18 months to satisfy the new standards. Such a result seems intrinsically unfair to the latter set of listed companies.

CONCLUSION

Based on the above, we respectfully request that the SEC take immediate action to reverse its approval of the increases in the market capitalization and stockholders’ equity requirements of the NYSE’s continued listing standards until all interested parties have had an opportunity to comment and the SEC has had an opportunity to consider those comments. In addition, we request the SEC ultimately deny the NYSE’s proposed increases in the market capitalization/stockholders’ equity requirements. Alternatively, we request that the SEC require amendments to the continued listing standards that in some way grandfather companies that satisfied the prior listing standards. Such grandfathering could include, for example, prohibiting the NYSE from seeking to delist such companies until such time as the

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revisions to the listing standards become permanent (if ever); delaying the date by which the NYSE may seek to delist such companies; or allowing such companies an extended period of time to come into compliance with the revised standards.

Thank you very much for your consideration of these comments. If you would like to discuss these matters further, please contact the undersigned.

Very truly yours,

von BRIESEN & ROPER, s.c.

Kenneth A. Hoogstra

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cc: Glenn Tyranski, NYSE

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