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 NASD. 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 publicly available. All submissions should refer to File Number SR–NASD–2005–026 and should be submitted on or before April 6, 2005.

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

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–1129 Filed 3–15–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51356; File No. SR–NASD–2004–159]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 Thereto To Allow NASD, on a Pilot Basis, To Review Denial of Access Complaints Related to the Alternative Display Facility

March 10, 2005.

On October 22, 2004, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to allow NASD, on a pilot basis, to review denial of access complaints related to the Alternative Display Facility (''ADF''). On January 11, 2005, NASD filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was published in the **Federal Register** on February 4, 2005.[4] The Commission received no comments on the proposal.

The proposed rule change would establish on a pilot basis new NASD Rule 4400A, which would give NASD the authority to receive and review complaints against an NASD Market Participant alleging denial of direct or indirect access of the NASD Market Participant's quotations in the ADF that the NASD Market Participant is required to provide pursuant to NASD Rule 4300A. In addition, proposed NASD Rule 4400A would set forth procedures for reviewing such complaints and would delegate authority to NASD's Market Regulation Committee to review denial of access determinations rendered in accordance with Rule 4400A.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[5] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[6] which requires, among other things, that the rules of an association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

New NASD 4400A affords some due process to a party claiming that an NASD Market Participant quoting ADF has denied it access to the NASD Market Participant's system. Establishing such a process should help deter improper denials of access. The Commission believes that it is reasonable and consistent with the Act for NASD to deter such denials by requiring an NASD Market Participant to respond to a complaint in the manner set forth in the new rule. Furthermore, where such deterrence is not effective, NASD will have the authority to direct the NASD Market Participant to restore the complainant's access promptly, which should help minimize any market disruption caused by an improper denial of access.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[7] that the proposed rule change (SR–NASD–2004–159), as amended, be hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–1157 Filed 3–15–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51322, File No. SR–NYSE–2004–20]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3, 4, 5, 6, and 7 Thereto by the New York Stock Exchange, Inc., To Amend Its Original and Continued Quantitative Listing Standards

March 8, 2005.

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 proposed rule change, as amended, was published for comment in the **Federal Register** on July 2, 2004.[4] On August 31, 2004, NYSE submitted Amendment No. 2 to the proposed rule change.[5] On November 29, 2004, NYSE submitted Amendment No. 3 to the proposed rule change.[6] On December

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, the NASD clarified the scope of authority it and the Market Regulation Committee would have to review denials of access.

[4] *See* Securities Exchange Act Release No. 51092 (January 28, 2005), 70 FR 6061.

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

[6] 15 U.S.C. 78o–3(b)(6).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaced and superseded the original filing in its entirety.

[4] *See* Securities Exchange Act Release No. 49917 (June 25, 2004), 69 FR 40439.

[5] Amendment No. 2 replaced and superseded the original filing in its entirety.

[6] Amendment No. 3 replaced and superseded the original filing in its entirety.

17, 2004, NYSE withdrew Amendment No. 3. On December 17, 2004, NYSE submitted Amendment No. 4 to the proposed rule change.[7] On January 25, 2005, NYSE submitted Amendment No. 5 to the proposed rule change.[8] On February 17, 2005, NYSE submitted Amendment No. 6 to the proposed rule change.[9] On March 4, 2005, NYSE submitted Amendment No. 7 to the proposed rule change.[10] 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, 802.01A, 802.01B, 802.01C, 802.02, and 802.03 of the NYSE's Listed Company Manual regarding the minimum numerical original and continued listing standards. Proposed new language is *italicized;* deletions are bracketed.[11]

* * * * *

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 *(2)*(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]*2,0*00,000 in *each of* the *two* most recent fiscal years, and positive amounts [for] *in all* [each of the preceding two] *three* years.

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

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

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

(ii) Fund an acquisition:

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

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

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

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

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

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

(1) Costs of severance and termination benefits

(2) Costs and associated revenues and expenses associated with the elimination and reduction of product lines

(3) Costs to consolidate or relocate plant and office facilities

(4) Loss or gain on disposal of long-lived assets

(ii) Environmental clean-up costs

(iii) Litigation settlement[.];

(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

[7] Amendment No. 4 replaced and superseded the original filing in its entirety.

[8] Amendment No. 5 replaced and superseded the original filing in its entirety.

[9] Amendment No. 6 partially amended Sections 802.01B, 802.02, and 802.03 of the proposed rule text.

[10] Amendment No. 7 partially amended Sections 802.03 of the proposed rule text.

[11] NYSE amended the proposed rule change to make technical corrections to Exhibit 5 of the proposed rule change. E-mail from Annemarie Tierney, Assistant General Counsel, and Glenn Tyranski, Vice President, Financial Compliance, NYSE, dated February 24, 2005.

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 Paras. 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.

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 $500,000,000 global market capitalization requirement based upon the completion of the offering (or distribution).

(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.

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 $500,000,000 global market capitalization requirement based upon the completion of the offering (or distribution).

''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 Section 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. *This press release must be issued concurrently with any listing announcement issued by the company or, if a listing announcement is not issued, within 30 days from the date the company lists on the NYSE.*

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

* * * * *

[(IV) Affiliated Company Standard

(1) Market capitalization of $500,000,000 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.]

* * * * *

103.00 Non-U.S. Companies

* * * * *

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

* * * * *

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

(I) Earnings Test

(1) Pre-tax earnings from continuing operations and after minority interest, amortization and equity in the earnings or losses of investees, adjusted [(C)(D)] for items specified in Section 102.01C(I)(2)(a) through (i) above, and 103.01*B*(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] Section 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.

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 $500,000,000 global market capitalization requirement based upon the completion of the offering (or distribution).

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.*

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 $500,000,000 global market capitalization requirement based upon the completion of the offering (or distribution).

''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 Section 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. *This press release must be issued concurrently with any listing announcement issued by the company or, if a listing announcement is not issued, within 30 days from the date the company lists on the NYSE.*

(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.]

* * * * *

802.00 Continued Listing

* * * * *

802.01 Continued Listing Criteria

The Exchange would normally give consideration to *the prompt initiation of suspension* and delisting *procedures with respect to* a security *of* either a domestic or non-U.S. issuer when:

802.01A. Distribution Criteria for Capital or Common Stock—

- Number of total stockholders *(A)* is less than—400

OR

- Number of total stockholders *(A)* is less than—1,200 and
- Average monthly trading volume is less than—100,000 shares (for most recent 12 months)

OR

- Number of publicly-held shares ([A]*B)* is less than—600,000([B]*C*)

(A) The number of beneficial holders of stock held in the name of Exchange member organizations will be considered in addition to holders of record.

([A]*B*) Shares held by directors, officers, or their immediate families and other concentrated holdings of 10% or more are excluded in calculating the number of publicly-held shares.

([B]*C*) If the unit of trading is less than 100 shares, the requirement relating to the number of shares publicly held shall be reduced proportionately.

802.01B Numerical Criteria for Capital or Common Stock

[If] *A*[a] company *that* falls below [any of the following] *the* criteria *applicable to the standard under which it originally listed will be considered to be below compliance* [, it is subject to the procedures outlined in Paras. 802.02 and 802.03:].

Notwithstanding items (I) to (IV) below, the Exchange will promptly initiate suspension and delisting procedures with respect to a company if that company is determined to have average global market capitalization over a consecutive 30 trading-day period of less than $25,000,000, regardless of the original standard under which it listed. A company is not eligible to follow the procedures outlined in Sections 802.02 and 802.03 with respect to this criteria.

(I) A company that qualified to list under the Earnings Test set out in Section 102.01C(I) or in Section 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) Average global market capitalization over a consecutive 30 trading-day period is less than $15,000,000; or]

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

(i) the listed company's parent/affiliated company ceases to control the listed company, or the listed company's parent/affiliated company itself falls below the continued listing standards applicable to the parent/affiliated company, and:

(ii) 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.

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.]

The Exchange will promptly initiate suspension and delisting procedures with respect to 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 [$15,000,000] $*25,000,000* [or (2)]. *In addition, the Exchange will promptly initiate suspension and delisting procedures with respect to* [in the case of] a Fund[,] it ceases to maintain its closed-end status.[, and in the case of a] *The Exchange will promptly initiate suspension and delisting procedures with respect to 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] *$35,000,000* and *will* advise the Fund, REIT or limited partnership of the delisting standard. Funds, REITs and limited partnerships are not [subject] *eligible* to *follow* the procedures outlined in Sections 802.02 and 802.03.

The Exchange will promptly initiate suspension and delisting procedures with respect to Bonds[—] *if:*

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

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

Bonds are not eligible to follow the procedures outlined in Sections 802.02 and 802.03.

The Exchange will promptly initiate suspension and delisting procedures with respect to Preferred Stock, Guaranteed Railroad Stock and Similar Issues[—] *if:*

(i) [•]*the* [A]*a*ggregate market value of publicly-held shares is less than $2,000,000*, or*

(ii) [•]*the number of* [P]*p*ublicly-held shares is less than 100,000.

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

[(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.]

802.01C Price Criteria *for Capital or Common Stock*[—]

A Company will be considered to be below compliance standards if the [A]*a*verage closing price of a security is less than $1.00 over a consecutive 30-trading-day period [(E)]. [(E)] Once notified, the company must bring its share price and average share price back above $1.00 by six months following receipt of the notification. [If this is the only criteria that makes the company below the Exchange's continued listing standards, the procedures outlined in Paras. 802.02 and 802.03 do not apply.] *A company is not eligible to follow the procedures outlined in Paras. 802.02 and 802.03 with respect to this criteria.*

* * * * *

802.00 Continued Listing

802.02 Evaluation and Follow-Up Procedures for Domestic Companies

The following procedures shall be applied by the Exchange to domestic companies [which] *that* are identified as being below the Exchange's continued listing criteria. Notwithstanding the above, when the Exchange deems it necessary for the protection of investors, trading in any security can be suspended immediately, and application made to the SEC to delist the security.

Once the Exchange identifies, through internal reviews or notice (a press release, news story, company communication, etc.), a company as being below the continued listing criteria set forth in Section 802.01(and not able to otherwise qualify under an original listing standard), the Exchange will notify the company by letter of its status within 10 business days. This letter will also provide the company with an opportunity to provide the Exchange with a plan (the ''Plan'') advising the Exchange of definitive action the company has taken, or is taking, that would bring it into conformity with continued listing standards within 18 months of receipt of the letter.

Within 10 business days after receipt of the letter, the company must contact the Exchange to confirm receipt of notification, discuss any possible financial data of which the Exchange may be unaware, and indicate whether or not it plans to present a Plan; otherwise, suspension and delisting procedures will commence. If the company submits a Plan, it must identify specific quarterly milestones against which the Exchange will evaluate the company's progress.

The company has 45 days from the receipt of the letter to submit its Plan to the Exchange for review; otherwise, suspension and delisting procedures will commence. If the company is determined to be below the criteria listed in Section 802.01B[(i) or 802.01B(iii)], the Plan it presents must demonstrate how it will *return to compliance with the applicable continued listing standard by the end of the Plan period* [reestablish both its market capitalization and stockholders' equity (or revenues, as applicable, to the levels specified in such clauses].

In any event, all companies submitting a Plan must include quarterly financial projections, details related to any strategic initiatives the company plans to complete, and market performance support. Exchange staff will evaluate the Plan, including any additional documentation that supports the Plan, and make a determination as to whether the company has made a reasonable demonstration in the Plan of an ability to come into conformity with the relevant standard(s) within 18 months. The Exchange will make such determination within 45 days of receipt of the proposed Plan, and will promptly notify the company of its determination in writing.

The company also has 45 days from receipt of the letter to issue a press release disclosing the fact that it has fallen below the continued listing standards of the Exchange. If the company fails to issue this press release during the allotted 45 days, the Exchange will issue the requisite press release.

If the Exchange does not accept the Plan, the Exchange will promptly initiate suspension and delisting procedures and issue a press release disclosing the forthcoming suspension and application to the SEC [for] *to* delist[ing of] the company's securities.

If the Exchange accepts the Plan, the Exchange will review the company on a quarterly basis for compliance with the Plan. If the company fails to meet the material aspects of the Plan or any of the quarterly milestones, the Exchange will review the circumstances and variance, and determine whether such variance warrants commencement of suspension and delisting procedures. Should the Exchange determine to proceed with suspension and delisting procedures, it may do so regardless of the company's continued listing status at that time. The Exchange will deem the Plan period over prior to the end of the 18 months if a company is able to demonstrate returning to compliance with the applicable continued listing standards, or achieving the ability to qualify under an original listing standard, for a period of two consecutive quarters. [This early Plan termination will not be available to a company based on satisfying the alternative criteria specified in clauses (ii) or (iii) of footnote C to Para. 802.01B.] In any event, if the company does not meet continued listing standards [(including the criteria specified in footnote C to Section 802.01B, if applicable)] at the end of the 18-month period, the Exchange promptly will initiate suspension and delisting procedures.

If the company, within twelve months of the end of the Plan period [(including any early termination of the Plan period under the procedures described above)], is again determined to be below continued listing standards, 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. It will then take appropriate action, which, depending upon the circumstances, may include truncating the procedures described above or immediately initiating suspension and delisting procedures.

802.03 Continued Listing

Evaluation and Follow-up Procedures for Non-U.S. Companies

The following procedures shall be applied by the Exchange to non-U.S. companies [who] *that* are identified as being below the Exchange's continued listing criteria. Notwithstanding the above, when the Exchange deems it necessary for the protection of the investors, trading in any security can be suspended immediately, and application made to the SEC to delist the security. Once the Exchange identifies, through internal reviews or notice (a press release, news story, company communication, etc.), a company as being below the continued listing criteria set forth in Section 802.01(and not able to otherwise qualify under an original listing standard), the Exchange will notify the company by letter of its status within 10 business days. This letter will also provide the company with an opportunity to provide the Exchange with a plan (the ''Plan'') advising the Exchange of definitive action the company has taken, or is taking, that would bring it into conformity with the standards within 18 month of receipt of the letter. Within 30 business days after receipt of the letter, the company must contact the Exchange to confirm receipt of notification, discuss any possible financial data of which the Exchange may be unaware, and indicate whether or not it plans to present a Plan; otherwise, suspension and delisting procedures will commence. If the company submits a Plan, it must identify specific semi-annual milestones against which the Exchange will evaluate the company's progress.

The company has 90 days from the receipt of the letter to submit its Plan to the Exchange for review; otherwise, suspension and delisting procedures will commence. If the company is determined to be below the criteria listed in Section 802.01B [(i) or 802.01B(iii)], the Plan it presents must demonstrate how it will *return to compliance with the applicable continued listing standard by the end of the Plan period* [reestablish both its market capitalization and stockholders' equity (or revenues, as applicable, to the levels specified in such clauses].

In any event, all companies submitting a Plan must include quarterly financial projections, details related to any strategic initiatives the company plans to complete, and market performance support. Exchange staff will evaluate the Plan, including any additional documentation that supports the Plan, and make a determination as to whether the company has made a reasonable demonstration in the Plan of an ability to come into conformity with the relevant standard(s) within 18 months. The Exchange will make such determination within 45 days of receipt of the proposed Plan, and will promptly notify the company of its determination in writing.

The company also has 90 days from receipt of the letter to issue press release disclosing the fact that it has fallen below the continued listing standards of the Exchange. If the company fails to issue this press release during the allotted 90 days, the Exchange will issue the requisite press release.

If the Exchange does not accept the Plan, the Exchange will promptly initiate suspension and delisting procedures and issue a press release disclosing the forthcoming suspension and application to the *SEC to* delist[ing of] the company's securities.

If the Exchange accepts the Plan, the Exchange will review the company on a semi-annual basis for compliance with the Plan. If the company fails to meet the material aspects of the Plan or any of the semi-annual milestones, the Exchange will review the circumstances and variance, and determine whether such variance warrants commencement of suspension and delisting procedures. Should the Exchange determine to proceed with suspension and delisting procedures, it may do so regardless of the company's continued listing status at that time. The Exchange will deem the Plan period over prior to the end of the 18 months if a company is able to demonstrate returning to compliance with the applicable continued listing standards, or achieving the ability to qualify under an original listing standard, for a period of two consecutive quarters. [This early Plan termination will not be available to a company based on satisfying the alternative criteria specified in clauses (ii) or (iii) of footnote C to Para. 802.01B.] In any event, *the Exchange will promptly initiate suspension and delisting procedures with respect to* [if the] *a* company *that* does not meet *the* continued listing standards [(including the criteria specified in footnote C to Para. 802.01B, if applicable)] at the end of the 18-month period[, the Exchange promptly will initiate suspension and delisting procedures.]

If the company, within twelve months of the end of the Plan period [(including any early termination of the Plan period under the procedures described above)], is again determined to be below continued listing standards, 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. It will then take appropriate action, which, depending upon the circumstances, may include truncating the procedures described above or immediately initiating suspension and delisting procedures.

* * * * *

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'').[12] 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.

Due to the fact that the Exchange requested the Commission approve the Pilot Program on an accelerated basis, 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 significant dismay at the automatic application of the new continued listing standards.[13] 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.[14] In File No. SR–NYSE–2004–15, the Exchange noted its intention to publish the requirements of the Pilot Program relating to Section 802.01B for public comment on a non-accelerated timeframe.[15] 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.[16]

In this filing, File No. SR–NYSE–2004–20, 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. File No. SR–NYSE–2004–20, as amended, by Amendment No. 1 was published in the **Federal Register** on July 2, 2004.[17] The Exchange also seeks approval for continued minimum listing standards, with changes to that proposed in File No. SR–NYSE–2003–43 that are responsive to public comments submitted to the Commission. 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 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. The Exchange represents that its standard in this respect remains far higher than any other U.S. marketplace.

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

[13] *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).

[14] *See* Securities Exchange Act Release No. 49443 (March 18, 2004), 69 FR 13929 (March 24, 2004) (File No. SR–NYSE–2004–15).

[15] *See id.*

[16] *See id.*

[17] *See* supra note 4.

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.[18] 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 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) of the Listed Company Manual 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 of the Listed Company Manual, 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 of the Listed Company Manual to the original listing standards of Section 102.01C used to qualify a company for listing. In addition, the Exchange proposes to add a minimum continued listing standard applicable to all companies regardless of original listing standard. This standard would require that all companies maintain average global market capitalization over a consecutive 30 trading-day period of at least $25,000,000 or be subject to suspension and delisting (the ''Minimum Continued Listing Standard'').[19]

Companies that list under the Pilot Program ''Earnings Test'' or its predecessor test will be considered to be below compliance if 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. This level has been increased in the proposal to reflect marketplace expectations of those companies deemed suitable for continued listing. The current alternate threshold for the Earnings Test that resulted in a company being below compliance if average global market capitalization over a consecutive 30 trading-day period is less than $15,000,000 is proposed to be eliminated as a result of the proposed $25,000,000 Minimum Continued Listing 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);[20] 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

[18] 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 supra* note 11 (approving File No. SR–NYSE–2003–43).

[19] This requirement is in substance identical to the proposal in File No. SR–NYSE–2003–43, but it restates the standard in a manner the Exchange believes is more readily understandable. In a substantive change from the current provisions and from the proposals as published for public comment, companies that fall below this minimum threshold would not be afforded the opportunity to submit a plan and ''cure'' their noncompliance over a plan period. In addition, companies that list under the Affiliated Company Test would be subject to the proposed $25,000,000 threshold, regardless of the status of their parent company.

[20] These levels are lower than the existing ''global market capitalization'' standard.

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.

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. Amendments are also proposed to make clear that companies that list under the Affiliated Company Standard are subject to the Minimum Continued Listing Standard, regardless of the status of the listed company's parent. In addition, the Exchange proposes to increase the continued listing criteria for closed-end 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. Likewise, with respect to the current requirements of Section 802.01B(iii) relating to companies that listed under the current global market capitalization standard, footnote (D) states that companies must reestablish both market capitalization and revenues in conformity with continued listing standards.

In a change from the proposals as originally published for comment, the Exchange proposes to eliminate footnotes (C) and (D) to Section 802.01B of the Listed Company Manual, and, instead proposes to amend Sections 802.02 and 802.03 to provide that a listed company's plan to regain compliance need only demonstrate how the company will cease to trigger the applicable Section 802.01B continued listing standard at the end of the allowable recovery period. For example, a company that listed under the proposed Earnings Test would be required to submit a plan that demonstrates how the company will exceed either the $75,000,000 market capitalization or shareholders' equity threshold, rather than be required to exceed both thresholds to regain compliance. It has been the Exchange's experience over the last five years that the sustained restoration of one component of the continued listing standard thresholds is evidence of a company's recovery. Due to the fact that a company would not be deemed below compliance unless it fell below both thresholds at the same time, the Exchange believes that the proposed amendment provides companies with a more rational basis for returning to compliance. This proposed change eliminates the potential for certain anomalies in situations where, for example, a company's stockholders' equity may never have been above the minimum and a decrease in market capitalization below the required threshold triggers non-compliance. Since it is the fact that market capitalization also dropped below the required threshold that results in a deficiency despite no change to stockholders' equity, the Exchange proposes to only require that the company recover market capitalization in order to regain compliance.

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 that 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, 802.01A, 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 Act [21] 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:

(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 April 6, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[22]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–1132 Filed 3–15–05; 8:45 am]

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[21] 15 U.S.C. 78f(b)(5).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51350; File No. SR-OCC–2004–19]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving a Proposed Rule Change Relating to Clearing Member Trade Assignment Processing

March 9, 2005.

On November 1, 2004, the Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change (File No. SR-OCC–2004–19) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934.[1] Notice of the proposal was published in the **Federal Register** on February 7, 2005.[2] No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

I. Description

The proposed rule change will add new clearing member trade assignment (''CMTA'') processing requirements to OCC's By-Laws and Rules. Specifically, OCC will modify Article I (''Definitions'') of its By-Laws and Rules 401 and 403 to require clearing members that are parties to a CMTA arrangement involving CMTA customers to register with OCC certain customer identifiers that the clearing members use to process the CMTA transactions. The new rules will provide that an exchange transaction executed on behalf of a CMTA customer that is to be transferred by CMTA processing for clearance and settlement will be identified by a special indicator called a Customer CMTA Indicator in the matching trade information submitted with respect to that transaction.[3] For each transaction marked with the

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 51120 (Feb. 1, 2005), 70 FR 6486.

[3] The same indicator will be used by all options exchanges. OCC made various system changes to process this indicator and other information to be supplied with respect to CMTA customers' transactions. Matching trade information submitted by the options exchanges will need to include this information that requires changes to the exchanges' systems.