SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51813, File No. SR-NYSE-2004-20)

June 9, 2005

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment Nos. 1, 2, 4, 5, 6, and 7 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 8 Thereto to Amend Its Original and Continued Quantitative Listing Standards

I. Introduction

On April 13, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC"), 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 amend Sections 102.01C, 103.01B, 802.01A, 802.01B, 802.01C, 802.02, and 802.03 of the NYSE's Listed Company Manual ("Listed Company Manual") regarding the minimum numerical original and continued listing standards. On May 20, 2004, NYSE submitted Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended by Amendment No. 1, was published for comment in the Federal Register on July 2, 2004.[4] The Commission received three comment letters on the proposed rule change, as amended by Amendment No. 1.[5] On August 31, 2004, NYSE submitted Amendment No. 2 to

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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3 Amendment No. 1 replaced and superseded the original filing in its entirety.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 See letters to Jonathan G. Katz, Secretary, Commission, from Richard F. Latour, President and CEO, MicroFinancial Inc., dated July 15, 2004 ("MicroFinancial Letter"); Kenneth A. Hoogstra, von Briesen & Roper, s.c., dated July 20, 2004 ("von Briesen Letter"); and John L. Patenaude, Vice President Finance and Chief Financial Officer, Nashua Corporation, dated July 22, 2004 ("Nashua Letter").

the proposed rule change.[6] On November 29, 2004, NYSE submitted Amendment No. 3 to the proposed rule change.[7] On December 17, 2004, NYSE withdrew Amendment No. 3. On December 17, 2004, NYSE submitted Amendment No. 4 to the proposed rule change.[8] On January 25, 2005, NYSE submitted Amendment No. 5 to the proposed rule change.[9] On February 17, 2005, NYSE submitted Amendment No. 6 to the proposed rule change.[10] On March 4, 2005, NYSE submitted Amendment No. 7 to the proposed rule change.[11] The proposed rule change, as amended, was re-published for comment in the Federal Register on March 25, 2005.[12] The Commission received one comment on the proposed rule change, as amended by Amendment Nos. 1, 2, 4, 5, 6, and 7.[13] On May 27, 2005, NYSE submitted Amendment No. 8 to the proposed rule change.[14] This order approves the proposed rule change,

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6 Amendment No. 2 replaced and superseded the original filing in its entirety. In addition, NYSE also responded to the three comment letters in Amendment No. 2.

7 Amendment No. 3 replaced and superseded the original filing in its entirety.

8 Amendment No. 4 replaced and superseded the original filing in its entirety.

9 Amendment No. 5 replaced and superseded the original filing in its entirety.

10 In Amendment No. 6, NYSE partially amended Sections 802.01B, 802.02, and 802.03 of the proposed rule text.

11 In Amendment No. 7, NYSE partially amended Sections 802.03 of the proposed rule text.

12 See Securities Exchange Act Release No. 51332 (March 8, 2005), 70 FR 15392.

13 See Letter to Jonathan G. Katz, Secretary, Commission, from Dorothy M. Donohue, Associate Counsel, Investment Company Institute, dated April 6, 2005 ("ICI Letter").

14 In Amendment No. 8, NYSE, in response to a comment letter, partially amended Section 802.01(B) of the proposed rule text to eliminate its proposed increase to the market capitalization continued listing requirement for closed-end funds, and to maintain the current market capitalization continued listing requirement for closed-end funds of $15 million with an early notification threshold of $25 million. In addition, the Exchange proposed to clarify that the proposed overall $25 million average market capitalization over 30 consecutive trading days continued listing standard set out in second paragraph of Section 802.01B of the Listed Company Manual applies only to companies that are listed under Sections 102.01C or 103.01B.

as amended by Amendment Nos 1 through 7. Simultaneously, the Commission provides notice of filing of Amendment No. 8 and grants accelerated approval of Amendment No. 8.

II. Description

The Exchange seeks permanent approval of changes to certain of its minimum numerical standards for the original listing and continued listing of equity securities on NYSE originally approved by the Commission on January 29, 2004, on a pilot program basis (the "Pilot Program").[15] Subsequently, to address concerns of a number of listed companies that did not comply with the Pilot Program's automatic application of new continued listing standards, 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.[16] In this filing, File No. SR-NYSE-2004-20, the Exchange 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 (but subsequently suspended) with modifications that are responsive to public comments submitted to the Commission.

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 proposes permanent approval of amendments to three of

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

16 See Securities Exchange Act Release Nos. 49443 (March 18, 2004), 69 FR 13929 (March 24, 2004) (File No. SR-NYSE-2004-15), and 51628 (April 28, 2005), 70 FR 23288 (May 4, 2005) (File No. SR-NYSE-2005-28).

these four standards that have been in effect under the Pilot Program.[17] The Exchange also proposes 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) of the Listed Company Manual 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

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17 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 15 (approving File No. SR-NYSE-2003-43).

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 proposes to permanently approve the Pilot Program amendments that will lower 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 have met the Pilot Program's lower thresholds to the "Pure Valuation/Revenue Test" and found that those companies performed to a standard that is appropriate for inclusion on the NYSE list.[18]

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 that restructures and amends the numerical continued listing standards. Section 802.01B of the

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[18] See Amendment No. 2, supra note 6.

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 Sections 102.01C or 103.01B 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 the original listing standard under which it listed. This standard would require that all companies listed under Sections 102.01C or 103.01B maintain average global market capitalization over a consecutive 30 trading-day period of at least $25 million or undergo the prompt initiation of suspension and delisting procedures by the Exchange (the "Minimum Continued Listing Standard").[19]

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[19] Issuers 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, issuers 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.

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 million and, at the same time, total stockholders' equity is less than $75 million. 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 million is proposed to be eliminated as a result of the proposed $25 million 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); or (b) average global market capitalization over a consecutive 30 trading-day period is less than $75 million.[20]

Issuers that list under the Pilot Program's "Pure Valuation/Revenue Test" or its predecessor test would be considered to be below compliance standards if: (a) average global market capitalization over a consecutive 30 trading-day period is less than $375 million and, at the same time, total revenues are less than $15 million over the last 12 months (unless the company qualifies as an original listing under one of the other original listing standards); or (b)

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

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 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.

The Exchange proposes, however, to eliminate footnotes (C) and (D) to Section 802.01B of the Listed Company Manual, and, instead 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, in this example, it is the fact that market capitalization also dropped below the required threshold that results in a deficiency (despite no change to stockholders' equity), under amended Sections 802.02 and 802.03, the company in this situation would only be required to 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 that 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 was to complete its currently applicable follow-up procedures and plan and was 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.

According to NYSE, 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 trading-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 proposes minor technical and conforming changes to Sections 102.02C, 103.01B, 802.01A, 802.01B, and 802.01C of the Listed Company Manual.

III. Summary of Comments

The Commission received three comment letters generally opposing the proposed rule change, as amended by Amendment No. 1 and published for comment in the Federal Register on July 2, 2004.[21] The commenters opposed the proposed increase to $75 million from $50 million to the Earnings Test continued listing standard thresholds for market capitalization and stockholders' equity million. Commenters believed that NYSE failed to provide a sufficient rationale for the proposal supported by data and market conditions.[22] One commenter noted that the proposed changes would affect only a small percentage of NYSE's listed companies.[23] The commenters argued that the proposed changes to the Earnings Test would be disruptive and particularly burdensome for the affected companies, leading to uncertainty among both affected issuers and their investors concerning the listing.[24] The commenters argued that the proposal would push affected companies to sacrifice long-term plans in favor of short-term growth,[25] or that smaller companies, currently in compliance, would be required to find alternatives in a short

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21 See Securities Exchange Act Release No. 49917 (June 25, 2004), 69 FR 40439.

22 See MicroFinancial Letter, supra note 5, at 3, and von Briesen Letter, supra note 5, at 2.

23 See MicroFinancial Letter, supra note 5, at 2.

24 See Nashua Letter, supra note 5, at 1; MicroFinancial Letter, supra note 5, at 2; and von Briesen Letter, supra note 5, at 2.

25 See von Briesen Letter, supra note 5, at 2.

period of time.[26] One commenter noted that a company currently below existing continued listing standards may, in some instances, be treated more favorably than those currently in compliance.[27] All three commenters argued for either a grace period or grandfather provision for affected companies,[28] and one commenter requested that the effective date of the proposal be clarified.[29]

In response to these comments, NYSE noted in Amendment No. 2 that it undertook a further review of the listed companies that are currently either below the proposed continued financial listing standard thresholds or within 10% of those thresholds and found that there were only 21 such companies representing 0.08% of all NYSE-listed companies. According to NYSE, these companies qualified under the original Earnings Test or the original Closed-end Fund, REIT, or Limited Partnership Test. NYSE represented that only ten of the 21 companies would have been below compliance under the proposed thresholds. NYSE represented that, of those ten, two companies were below compliance under the existing thresholds and one additional REIT was operating under a liquidation process expected to be completed in August 2004. NYSE noted that it believed that the proposed increases to the current continued listing standards were appropriate. As a result of these comments, NYSE filed Amendment No. 2 and proposed

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26 See Nashua Letter, supra note 5, at 1

27 See von Briesen Letter, supra note 5, at 3.

28 See MicroFinancial Letter, supra note 5, at 3-4; Nashua Letter, supra note 5, at 2; and von Briesen Letter, supra note 5, at 3-4.

29 See von Briesen Letter, supra note 5, at 3.

to amend Sections 802.02 and 802.03 of the Listed Company Manual to modify the thresholds that companies must exceed in order to regain compliance with the continued listing standards.[30]

The Commission received one comment letter from ICI partially opposing the proposed rule change, as amended by Amendment Nos. 1, 2, 4, 5, 6, and 7 and published for comment in the Federal Register on March 25, 2005.[31] ICI opposed the part of the proposal dealing with continued listing standards for closed-end funds.[32] Specifically, ICI objected to the proposed change that would subject closed-end funds that fall below an average market capitalization of $25 million over 30 consecutive trading days to immediate suspension and delisting instead of the $15 million requirement that is currently in effect. ISI stressed that the proposal does not take into account that NYSE maintains distinct initial listing standards for closed-end funds in a fund family verses stand-alone closed-end funds (noting that that funds in a fund family must have a public market value of $30 million versus stand-alone funds that must have a public market value of $60 million).[33] As a result, ISI believes that treating all closed-end funds, stand-alone funds and those listed as part of a fund family, the same by implementing a uniform $25 million market capitalization requirement with respect to the Exchange's continued listing

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30 Specifically and as described in greater detail above, the Exchange proposed to eliminate footnotes (C) and (D) to Section 802.01B of the Listed Company Manual, and, instead proposed 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. Amendment No. 2 also proposed to provide the Exchange with flexibility to extend a company's Plan period by an additional 12 months in certain circumstances. This aspect of the proposal was later removed.

31 See Securities Exchange Act Release No. 51332 (March 8, 2005), 70 FR 15392.

32 See ICI Letter, supra note 13.

33 See ICI Letter, supra note 13, at 1-2. ISI asserts that NYSE initially created this distinction to accommodate the wishes of fund families that generally prefer to list all of their funds on the same market.

standards is inappropriate.[34] ISI instead recommended that NYSE maintain its current $15 million continued listing standard for closed-end funds that list as part of a fund family. ISI believes that its approach would make the NYSE's continued listing standard for closed-end funds more consistent with the continued listing standards for other issuers and also make it easier for fund families to list all of their funds on one exchange.[35]

In response to ISI's comment, NYSE acknowledged in Amendment No. 8 that closed-end funds listing in a fund family are subject to distinct alternative listing criteria that permit the listing of all of the funds in a family, if, among other things, no one fund has a market value of publicly held shares of less than $30 million (rather than the $60 million required for the listing of individual closed-end funds). NYSE also acknowledged that a fund that lists under the fund family initial listing standard with a market value of publicly held shares of $30 million would be subject to immediate early warning for delisting based on the originally proposed $35 million early notification threshold. In order to avoid this peculiar result, NYSE modified its proposal in Amendment No. 8 to maintain the existing market capitalization continued listing criteria for closed-end funds at its current level of $15 million with an early notification threshold of $25 million.

IV. Discussion and Commission Findings

After careful review of the proposal and consideration of the comment letters, the Commission finds that the proposed rule change, as amended, is consistent with the requirements

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34 See ICI Letter, supra note 13, at 2. ISI notes that stand-alone funds would be subject to delisting if they there is more than a 58 percent decline in market capitalization versus closed-end funds that would be subject to delisting if there is more than a 16 percent decrease.

35 See ICI Letter, supra note 13, at 2.

of the Act and the rules and regulations thereunder applicable to a national securities exchange.[36] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[37] which requires that the rules of an exchange 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.

The proposed changes to Section 102.01C(I) of the Listed Company Manual amending the Earnings Test would require that companies demonstrate pre-tax earnings of $10 million in aggregate for the last three fiscal years. The proposed Earnings Test would also require that the company demonstrate positive results in all three of the years tested with a minimum of $2 million in earnings in each of the preceding two years. The Commission believes that these amendments are consistent with the Act.

The amendments to the current thresholds of Section 102.01C(III) of the Listed Company Manual would require, in order to qualify for listing under the "Pure Valuation/Revenue Test," 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. The Commission believes that it is appropriate for the Exchange, based upon its experience, to determine that the companies that meet this proposed standard would be appropriate for inclusion on the NYSE list.

In addition, the Commission believes that the amendments to the numerical continued listing standards in Section 802.01B of the Listed Company Manual should simplify and clarify the continued listing standards, by relating the continued listing standards to the original listing

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36 In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

37 15 U.S.C. 78f(b)(5).

standards set forth in Sections 102.01C and 103.01B. The Commission believes that it is consistent with the Act for the Exchange, based upon its experience, to determine that the proposed categories of listing standards reflect marketplace expectations of those companies deemed suitable for continued listing. The Commission also believes that it is consistent with the Act for the Exchange to allow a company to regain compliance by ceasing to trigger the applicable continued listing standard it violated by the end of the recovery period. In addition, the Commission notes that, in general, the continued listing standards reflect the proportional adjustments in the initial listing standards.

Three commenters, in responding to the proposed rule change as amended by Amendment No. 1, opposed the proposed increase to $75 million from $50 million to the Earnings Test continued listing standard thresholds for market capitalization and stockholders' equity million. These commenters believed that NYSE failed to provide a sufficient rationale for the proposal supported by data and market conditions.[38]

After carefully considering these comment letters, the Commission, however, believes that the proposed continued listing standards are reasonable and consistent with the Act. The Commission believes that the commenter's concerns are addressed by Amendment No. 2, in which NYSE proposed to amend Sections 802.02 and 802.03 of the Listed Company Manual to modify the thresholds that companies must exceed in order to regain compliance with the continued listing standards.[39] NYSE also noted that it undertook a further review of the listed

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38 See MicroFinancial Letter, supra note 5, at 3, and von Briesen Letter, supra note 5, at 2.

39 Specifically and as described in greater detail above, the Exchange proposed to eliminate footnotes (C) and (D) to Section 802.01B of the Listed Company Manual, and, instead proposed 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

companies that are currently either below the proposed continued financial listing standard thresholds or within 10% of those thresholds and found that there were only 21 such companies representing 0.08% of all NYSE-listed companies. NYSE represented that only ten of the 21 companies would have been below compliance under the proposed thresholds. NYSE represented that, of those ten, two companies were below compliance under the existing thresholds and one additional REIT was operating under a liquidation process expected to be completed in August 2004.

The commenters also argued for either a grace period or grandfather provision for affected companies,[40] and one commenter requested that the effective date of the proposal be clarified.[41] The commenters argued that the proposed changes to the Earnings Test would be disruptive and particularly burdensome for the affected companies, leading to uncertainty among both affected issuers and their investors concerning the listing.[42]

The Commission finds that the Exchange has provided an implementation schedule for the amended continued listing standards that includes a sufficient transition period for affected companies. Specifically, the Exchange will provide a period of 30 trading-days from the date of Commission approval of the proposed amendments until such amendments will become effective. In addition, for those companies that are currently within a 12-month period following their

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applicable Section 802.01B continued listing standard at the end of the allowable recovery period. Amendment No. 2 also proposed to provide the Exchange with flexibility to extend a company's Plan period by an additional 12 months in certain circumstances. This aspect of the proposal was later removed.

40 See MicroFinancial Letter, supra note 5, at 3-4; Nashua Letter, supra note 5, at 2; and von Briesen Letter, supra note 5, at 3-4.

41 See von Briesen Letter, supra note 5, at 3.

42 See Nashua Letter, supra note 5, at 1; MicroFinancial Letter, supra note 5, at 2; and von Briesen Letter, supra note 5, at 2.

recovery from previous non-compliance (pursuant to a Plan) and would fall below continued listing standards as a direct result of the approval of the proposal, the Exchange does not intend to truncate the normal procedures or immediately initiate suspension and delisting procedures, solely on the basis of the proposed increase to the current continued listing standards. The Exchange intends to take into consideration all of the facts and circumstances relating to the company, including the relationship between the two incidents of falling below the continued listing standards and the method of recovery from the first incident, in determining whether to allow such a company to submit a second Plan.

The Exchange intends to allow companies that are currently below the continued listing standards to complete their 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, such companies are compliant with the continued listing standards for which they were originally notified, but below the increased requirements proposed herein, the Exchange would grant 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 increased requirements within a further 12 months. In addition, if a company completes its currently applicable follow-up procedures and Plan and is not compliant at that time with the continued listing standards for which it was originally notified, but is above the increased requirements set forth above, the Exchange would consider that company to be in conformity with the continued listing standards.

The Commission believes that the Exchange's transition policies are clearly delineated and consistent with the Act. The Commission notes that the notice and comment periods

provided for this filing and the additional period of 30 trading-days from the date of Commission approval of the proposed amendments until such amendments would become effective should provide sufficient notice to issuers that may be below compliance with the proposed continued listing standards. The Commission, however, expects that the Exchange will follow closely the progress of companies that are currently in their Plan period or subsequent 12-month period, to ensure that these companies will satisfy the new continued listing standards. The Commission notes that, pursuant to Section 802.02 of the Listed Company Manual, the Exchange has the discretion to suspend trading in any security and apply to the Commission for delisting, when the Exchange deems it necessary for the protection of investors.

In addition, the Commission received one comment letter from ICI in response to the proposed rule change, as amended by Amendment Nos. 1 through 7. ICI objected to the proposed change that would subject closed-end funds that fall below an average market capitalization of $25 million over 30 consecutive trading days to immediate suspension and delisting instead of the $15 million requirement that is currently in effect. The Commission believes that the ISI's concerns are answered by Amendment No. 8, which maintains the existing market capitalization continued listing criteria for closed-end funds at its current level of $15 million with an early notification threshold of $25 million.

The Commission finds good cause for approving proposed Amendment No. 8 before the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. NYSE filed Amendment No. 8 in response to a comment it received after the publication of notice of filing of the proposed rule change to address the commenter's concerns.[43] Because Amendment

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[43] See Summary of Comments, supra Section III.

No. 8 proposes simply to maintain the current market capitalization continued listing requirement in effect for closed-end funds,[44] the Commission finds good cause for accelerating approval of the proposed rule change, as amended by Amendment No. 8.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the Amendment No. 8, including whether the proposed rule change, as amended by Amendment No. 8, 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, Station Place, 100 F Street, NE, Washington, DC 20549-9303. 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

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[44] See note 14, supra.

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, Washington, DC 20549-9303. Copies of such filing also will be available for inspection and copying at the principal office of NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2004-20 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[45] that the proposed rule change (SR-NYSE-2004-20), as amended by Amendment Nos. 1, 2, 4, 5, 6, and 7, is hereby approved, and that Amendment No. 8 to the proposed rule change be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[46]

Margaret H. McFarland
Deputy Secretary

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45 15 U.S.C. 78s(b)(2).

46 17 CFR 200.30-3(a)(12).