

rule would permit a member to submit a written request that the Exchange list a particular option class, specifying the reasons why the member believes the Exchange should list the option class. The Stock Selection Committee would be required to make a decision regarding the request within 35 days of its receipt and to provide the member that submitted the request with a written response setting forth the rationale for the decision within ten days of making the decision.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁶ Specifically, the Commission believes that the proposed rule change is consistent with the section 6(b)(5)⁷ requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that the proposed rule change will remove impediments to and perfect the mechanisms of a free and open market by providing formal procedures for members to request the listing of options on the Exchange. The proposal would require the Exchange to respond in writing within 45 days to requests by members to list options. The Commission believes that the proposed procedures and time frames set forth in the proposed rule change are reasonable and adequately balance the Exchange's need to thoroughly examine proposed listings before making its determination with its members' need for a prompt and specific response to its listing recommendation.

In addition, the proposed rule change codifies the factors to be considered by the Exchange in determining whether to list a recommended option. The Commission believes that the proposed factors represent legitimate issues that the Exchange may consider when making a listing decision. The

Commission notes that if the Exchange denies or places conditions or limitations upon a proposed listing, it must include its reasons in the letter notifying the member of its decision. The Commission believes that this requirement should help to ensure that the Exchange relies only upon the factors codified in its rules when making a listing decision.

The Commission finds good cause for accelerating approval of Amendment No. 1 to the proposed rule change prior to the thirtieth day after publication in the **Federal Register**. The Commission notes that Amendment No. 1 provides useful clarification to the proposed rules. Accordingly, the Commission finds that good cause exists, consistent with sections 6(b)(5)⁸ and 19(b) of the Act,⁹ to accelerate approval of Amendment No. 1 to the proposed rule change.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 1, including whether the amendment is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to the File No. SR-CBOE-2001-10 and should be submitted by July 24, 2001.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-CBOE-2001-10), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44481; File No. SR-NYSE-2001-02]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. Relating to the NYSE's Financial Standards for Listing and the Procedures Applied by the Exchange to Companies Below the Exchange's Continued Listing Criteria

June 27, 2001.

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 January 26, 2001, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On April 25, 2001, the Exchange submitted Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons. For the reasons discussed below, the Commission is granting accelerated approval of the proposed rule change, as amended.

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

The proposed rule change consists of amendments to Sections 102, 103, and 802 of the Exchange's *Listed Company Manual* ("Manual") and Exchange Rule 499. The proposed amendments to Sections 102 and 103 of the *Manual* implement a modification to generally accepted accounting principles (GAAP), while proposed amendments to Section

member or member organization requests the exchange to list options not currently trading on the exchange. See Order Instituting Public Administrative Proceedings Pursuant to section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions ("Settlement Order"). Securities Exchange Act Release No. 43268 (September 11, 2000).

⁶ In approving the proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁷ 15 U.S.C. 78f(b)(5).

⁸ 15 U.S.C. 78f(b)(5).

⁹ 15 U.S.C. 78s(b).

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Letter from James E. Buck, Senior Vice President & Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission (April 24, 2001). Amendment No. 1 replaces the proposed rule change in its entirety.

802 consist of technical changes in how certain requirements are applied, and provide some alternative measures by which a company operating under a plan to bring itself into conformity with continued listing standards within 18 months of falling below the Exchange's continued listing criteria ("Plan")⁴ may be deemed to have returned to compliance. The proposed amendments to NYSE Rule 499 reflect the proposed amendments to Section 802 of the *Manual*.

The text of the proposed rule change, as amended, is as follows. New text is italicized and deleted text is bracketed.

* * * * *

102.00 Domestic Companies

102.01 Minimum Numerical Standards—Domestic Companies—Equity Listings

* * * * *

102.01C. A company must meet one of the following financial standards.

(I)(1) Pre tax earnings from continuing operations and after minority interest, *amortization* and equity in the earnings or losses of investees as adjusted (E) for items specified in (2)(a) through (i) below (F) must total at least:

\$2,500,000 in the latest fiscal year together with \$2,000,000 in each of the preceding two years; or

\$6,500,000 in the aggregate for the last three fiscal years together with a minimum of \$4,500,000 in the most recent fiscal year, and positive amounts for each of the preceding two years.

* * * * *

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)(1) Pre tax earnings from continuing operations and after minority interest, *amortization* and equity in the earnings or losses of investees are adjusted (C)(D) for items specified in para. 102.01C

(I)(2)(a) through (i) above, and 103.01(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 years.

* * * * *

802.00 Continued Listing

802.01 Continued Listing Criteria

The Exchange would normally give consideration to delisting a security

either a domestic or non-U.S. issuer when:

* * * * *

802.01B Numerical Criteria for Capital or Common Stock

If a company falls below any of the following criteria, it is subject to the procedures outlined in Paras. 802.02 and 802.03:

• (i) [Total] *Average* global market capitalization *over a consecutive 30 trading-day period* is less than \$50,000,000 and total stockholders' equity [or, for partnerships, both the general and limited partners' capital as applicable,] is less than \$50,000,000 (C); or

• (ii) *Average* global market capitalization over a consecutive 30 trading-day period is less than \$15,000,000; or

• (iii) For companies that [qualify] *qualified for original listing* under the "global market capitalization" standard:

[Total] *Average* global market capitalization *over a consecutive 30 trading-day period* is less than \$500,000,000 and total revenues are less than \$20,000,000 over the last 12 months (unless the resultant entity qualifies as an original listing under one of the other original listing standards) [(C)] (D); or

Average global market capitalization over a consecutive 30 trading-day period is less than \$100,000,000.

When applying the market capitalization test in any of the *above* three 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 [million] *average global* market capitalization and stockholders' equity test unless the parent/affiliated company no longer controls the entity or such parent/affiliated company itself falls below the continued listing standards *described* in this section.

Funds, REITs and Limited Partnerships—will be subject to

immediate suspension and delisting procedures if (1) the *average* market capitalization over 30 consecutive trading days is below \$15,000,000 or (2) [the Fund] *in the case of a Fund, it ceases to maintain its closed-end status, and in the case of 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 and advise the [f]Fund, *REIT or limited partnership* of the delisting standard. Funds, *REITs and limited partnerships* are not subject to the procedures outlined in Paras. 802.02 and 802.03.

[REITs—Until a REIT has operated for three years, it shall be held to a continued listing standard of \$30,000,000 in both total market capitalization and stockholders' equity. Regardless of the length of time a REIT has been operating at the time of its initial listing, once it has operated for three years, it shall be held to the financial criteria outlined at the beginning of this Para.802.01B. At all times, all REITs must (1) maintain their REIT status (unless the resultant entity qualifies as an original listing as a corporation), and (2) maintain a minimum market capitalization of \$15,000,000.]

* * * * *

(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 [stockholders' equity or] revenues[, as applicable,] to be considered in conformity with continued listing standards pursuant to Paras. 802.02 and 802.03.

⁴ Section 802.02 of the *Manual*.

802.01C Price Criteria

Average closing price of a security is less than \$1.00 over a consecutive 30 trading-day period (ID)E)

(ID)E) Once notified, the company must bring its *share price and* average share price back above \$1.00 by [the later of its subsequent annual meeting date or] 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. The company must, however, notify the Exchange, within 10 business days of receipt of the notification, of its intent to cure this deficiency or be subject to suspension and delisting procedures. In the event that at the expiration of the six-month cure period, *both a \$1.00 share price and a \$1.00 average share price over the preceding 30 trading days [is] are not attained*, the Exchange will commence suspension and delisting procedures. *Notwithstanding the foregoing, if a company determines that, if necessary, it will cure the price condition by taking an action that will require approval of its shareholders, it must so inform the Exchange in the above referenced notification, must obtain the shareholder approval by no later than its next annual meeting, and must implement the action promptly thereafter. The price condition will be deemed cured if the price promptly exceeds \$1.00 per share, and the price remains above that level for at least the following 30 trading days.*

Nowwithstanding the foregoing, if the subject security is not the primary trading common stock of the company (e.g., a tracking stock or a preferred class) or is a stock listed under the Affiliated Company standard where the parent remains in "control" as that term is used in that standard, the Exchange may determine whether to apply the Price Criteria to such security after evaluating the financial status of the company and/or the parent/affiliated company, as the case may be.

* * * * *

802.02 Evaluation and Follow-up Procedures for Domestic Companies

The following procedures shall be applied by the Exchange to domestic companies which 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 Para. 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 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 [(1) whether the Plan shows the company meeting the continued listing standards within the 18 months and (2) whether the company has made a reasonable demonstration in the Plan of an ability to come into conformity with continued listing standards.] *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 delisting 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 alternate 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 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, [did meet continued listing standards at the end of the 18-month Plan period but] within twelve months of the end of the [18-month] Plan period (*including any early termination of the Plan period under the procedures described above*), [it] 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 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 Para. 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 months 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 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 [(1) whether the Plan shows the company meeting the

continued listing standards within the 18 months and (2) whether the company has made a reasonable demonstration in the Plan of an ability to come into conformity with continued listing standards.] *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 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 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 disclosing the forthcoming suspension and application to the delisting 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 on satisfying the alternate 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 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, [did meet continued listing standards at the end of the 18-month Plan period but] within twelve months of the end of the [18-month] Plan period (including any early

termination of the Plan period under the procedures above), [it] 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.

Delisting of Securities**Suspension from Dealings or removal from List by Action of the Exchange**

* * * * *

Rule 499. Securities admitted to the list may be suspended from dealings or removed from the list at any time.

• • • **Supplementary Material:**

* * * * *

.20 NUMERICAL AND OTHER CRITERIA.

* * * * *

The Exchange would normally give consideration to suspending or removing from the list a security of a company, whether it be a domestic or non-U.S. issuer, when:

* * * * *

4. [* Total] *Average* global market capitalization over a consecutive 30 trading-day period is less than \$50,000,000, and total stockholders' equity [or, for partnerships, both the general and limited partners' capital as applicable,] is less than \$50,000,000 *; or [A company that is determined to be below this continued listing criteria must reestablish both its market capitalization and its stockholders' equity (or net assets for Funds) to be considered to conformity with continued listing standards pursuant to Sections .50 and .60]

* *To be considered in conformity with continued listing standards pursuant to Paras .50 and .60 of this Rule 499, 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.

5. [*] Average global market capitalization over a consecutive 30 trading-day period is less than \$15,000,000[.]; or

6. [*] For companies that [qualify] *qualified for original listing* under the "global market capitalization" standard:

- [Total] Average global market capitalization over a consecutive 30 trading-day period is less than \$500,000,000 and total revenues are less than \$20,000,000 over the past 12 months (unless the resultant entity qualifies as an original listing under one of the other standards). ** [A company that is determined to be below this continued listing criteria must reestablish both its market capitalization and its revenues to be considered in conformity with continued listing standards pursuant to Sections .50 and .60]

OR

- Average global market capitalization over a consecutive 30 trading-day period is less than \$100,000,000.

* * A company that is determined to be below this continued listing criteria must reestablish both its market capitalization and its revenues to be considered in conformity with continued listing standards pursuant to Paras. .50 and .60 of this Rule 499.

[*] When applying the market capitalization test in any of the three standards described in sections 4–6, 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 or affiliated company no longer controls the equity or such parent/affiliated company itself falls below the continued listing standards described herein.

7. Funds, REITs and Limited Partnerships will be subject to

immediate suspension and delisting procedures if (1) the average market capitalization over 30 consecutive trading days is below \$15,000,000 or (2) [the Fund] *in the case of a Fund*, it ceases to maintain its closed-end status, *and in the case of 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 [f]Fund, REIT or limited partnership if the average market capitalization falls below \$25,000,000 and advise the fund, REIT of limited partnership of the delisting standard. Funds, REITs and limited partnerships are not subject to the procedures outlined in [Paras. 802.02 and 802.03] *Paras. .50 and .60 of this Rule 499.*

[8. REITs—Until a REIT has operated for three years, it shall be held to a continued listing standard of \$30,000,000 in both total market capitalization and stockholders' equity. Regardless of the length of time a REIT has been operating at the time of its initial listing, once it has operated for three years, it shall be held to the financial criteria outlined in sections 4–6 above. At all times, all REITs must (1) maintain their REIT status (unless the resultant entity qualifies as an original listing as a corporation), and (2) maintain a minimum market capitalization of \$15,000,000.]

[9] 8. Average closing price of a security is less than \$1.00 over a consecutive 30 trading-day period. Once notified, the company must bring its share price and average share price back above \$1.00 by [the later of its subsequent annual meeting date or] 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. .50 and .60 of this Rule 499 do not apply. The company must, however, notify the Exchange, within 10 business days of receipt of the notification, of its intent to cure this deficiency. In the event that at the expiration of the cure period, both a \$1.00 share price and a \$1.00 average share price over the preceding 30 trading days [is] are not attained, the Exchange will commence suspension and delisting procedures.

Notwithstanding the foregoing, if a company determines that, if necessary, it will cure the price condition by taking an action that will require approval of its shareholders, it must so inform the Exchange in the above referenced notification, must obtain the shareholder approval by no later than its next annual meeting, and must implement the action promptly thereafter. The price condition will be

deemed cured if the price promptly exceeds \$1.00 per share, and the price remains above that level for at least the following 30 trading days.

Notwithstanding the foregoing, if the subject security is not the primary trading common stock of the company (e.g., a tracking stock or a preferred class) or is a stock listed under the Affiliated Company standard where the parent remains in "control" as that term is used in that standard, the Exchange may determine whether to apply the Price Criteria to such security after evaluating the financial status of the company and/or the parent/affiliated company, as the case may be.

* * * * *

.50 Continued Listing Evaluation and Follow-up Procedures for Domestic Companies—

The following procedures shall be applied by the Exchange to domestic companies, which 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 [¶ 802.01] *Par. .20 of this Rule 499 (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 subparagraphs 4 or 6⁵ of Para. .20 of this Rule 499, the Plan it presents must demonstrate how it will 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 [(1) whether the Plan shows the company meeting the continued listing standards within the 18 months and (2) whether the company has made a reasonable demonstration in the Plan of an ability to come into conformity with continued listing standards.] *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 delisting 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 alternate criteria specified in clauses (ii) or (iii) of footnote * to subparagraph 4⁶ of Para. .20 of this Rule 499.* In any event, if the company does not meet continued listing standards *(including the criteria specified in footnote * to subparagraph 4⁷ of Para. .20 of this Rule 499, 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.

.60 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 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 [¶. 802.01] *Para. .20 of this Rule 499 (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 months 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 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 subparagraphs 4 or 6⁸ of Para. .20 of this Rule 499, the Plan it presents must demonstrate how it will 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 [(1) whether the Plan shows the company meeting the continued listing standards within the 18 months and (2) whether the company has made a reasonable demonstration in the Plan of an ability to come into conformity with continued listing standards.] *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 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 90 days, the Exchange will issue the requisite press release.

If the Exchange does not accept the Plan, the Exchange will promptly

⁵ The NYSE corrected a typographical error that appeared in the proposed rule language. Telephone conversation between James F. Duffy, Senior Vice President and Associate General Counsel, NYSE; Florence Harmon, Senior Special Counsel, Division of Market Regulation ("Division"), Commission; and Susie Cho, Special Counsel, Division, Commission, June 26, 2001.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

initiate suspension and delisting procedures and issue a press release disclosing the forthcoming suspension and application to the delisting 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 alternate criteria specified in clauses (ii) or (iii) of footnote * to subparagraph 4⁹ of Para. .20 of this Rule 499.* In any event, if the company does not meet continued listing standards (including the criteria specified in footnote * subparagraph 4¹⁰ of Para. .20 of this Rule 499, 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 III 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 proposed rule change consists of amendments to Sections 102, 103, and 802 of the *Manual* and corresponding changes to Exchange Rule 499. Sections 102 and 103 of the *Manual* take into account a modification to generally accepted accounting principles (GAAP), while proposed amendments to Section 802 consist of technical changes in how certain requirements are applied, and provide some alternative measures by which companies operating under a Plan (as such term defined in Section 802.02 of the *Manual*) may be deemed to have returned to compliance with continued listing standards. The proposed amendments to Rule 499 reflect the proposed amendments to Section 802 of the *Manual*.

Amendments to Sections 102 and 103 of the Manual (Original Listing)

Sections 102 and 103 of the *Manual* set forth the criteria for original listing of, respectively, domestic and foreign issuers. In each case, one of the available criteria focuses on pre-tax earnings. Traditionally, GAAP required amortization expense to be reflected in the calculation of pre-tax earnings. Under a modification to GAAP, however, amortization expense may now be taken below the pre-tax earnings line on the income statement. Accordingly, the NYSE proposes to amend the existing criteria to specify that amortization expense should be deducted when computing pre-tax earnings for purposes of determining eligibility under the Exchange's earnings criteria.

Amendments to Section 802 (Continued Listing)

Last year, the Exchange implemented revisions to the continued listing standards and to the structure of the Plan process.¹¹ The Exchange believes that the changes have worked well. However, the Exchange represents that

as it has gained additional experience, the need for adjustments or clarification became apparent. The proposed amendments to Section 802 are refinements that the Exchange believes will make the process more transparent and more effective.

Background

Section 802.01B establishes a "conjunction test" pursuant to which a company is considered below continued listing standards if both its market capitalization and its stockholders' equity fall below \$50,000,000. Similar tests with different market capitalization requirements apply to companies listed on the basis of global market capitalization, and to real estate investment trusts (REITs). The *Manual* specifies that the Exchange requires a company to raise *both* measures back above the specified level to be considered again in compliance with continued listing standards. Section 802 of the *Manual* also specifies that a company is below standards if its market capitalization is below \$15,000,000, without regard to stockholders' equity. Listed closed-end funds, as to which stockholders' equity is not relevant, are subject only to the latter standards.

Section 802.02 of the *Manual* specifies the process by which a listed company that is determined to be below standards may submit to the Exchange a plan (the "Plan") demonstrating how it will return to compliance with continued listing standards within 18 months. The Exchange monitors a company's performance under the Plan, and companies that cannot return to standards in 18 months are delisted. Section 802.03 of the *Manual* contains parallel provisions for non-U.S. companies.

Separately, Section 802.01C of the *Manual* provides that a company will be below listing criteria if its average closing share price over a consecutive 30 trading-day period is less than \$1.00. Such a company is required to bring its 30 trading-day average closing price above \$1.00 by the later of its next annual meeting date or six months after receipt of notification from the Exchange.

Proposed Changes

Financial Criteria. Section 802.01B specifies that the \$15,000,000 market capitalization test is measured over a consecutive 30 trading-day period. In contrast, the market capitalization part of the "conjunction test" and the global market capitalization standard are measured at a point in time. The Exchange now believes that a market

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Securities Exchange Act Release No. 43288 (September 13, 2000), 65 FR 56974 (September 20, 2000).

value snapshot is of limited utility, and that these criteria should be measured over 30 consecutive trading days. Separately, the Exchange believes that stockholders' equity is not a useful measure when applied to limited partnerships or REITs listed on the Exchange, and the Exchange proposes to apply to limited partnerships and REITs the same \$15,000,000 market capitalization-only test that is applied to closed-end funds.

Financial Plan. The Exchange is proposing several modifications to the Plan process. The Exchange will continue to ask companies to demonstrate how they will reestablish both sides of the "conjunction test" within 18 months.

For companies that have fallen below the \$50,000,000 market capitalization/stockholders' equity "conjunction test," however, the Exchange has identified certain alternate recovery measures in Footnote C of Section 802.01B. A company that achieves any of the alternate recovery measures ("Footnote C Company") would be considered in conformity with continued listing standards pursuant to Sections 802.02 and 802.03 of the *Manual*. In essence, the Exchange proposes that such a company be considered in compliance with standards even without restoring both market capitalization and stockholders' equity to above \$50,000,000, if the company, by the end of the Plan period, either

- (i) Reestablishes both its market capitalization and its stockholders' equity to the \$50,000,000 level;
- (ii) Achieves an average global market capitalization over a consecutive 30 trading-day period of \$100,000,000; or
- (iii) Achieves an average global market capitalization over a consecutive 30 trading-day period of \$60,000,000, together with either a stockholders' equity of \$40,000,000, or an increase in stockholders' equity of at least \$40,000,000 since the company was notified by the Exchange that it was below standards.

The Exchange considers these appropriate alternative recovery measures to apply at the end of an 18-month financial Plan period, but it will still require a company to provide a financial Plan that addresses how the company will restore its market capitalization and equity to the \$50,000,000 level. Companies that return to compliance by satisfying one of the Footnote C alternate criteria will be considered in conformity with continued listing standards pursuant to Sections 802.02 and 802.03 unless they fall below the continued listing criteria specified in Section 802.01B, *i.e.*, the

\$50,000,000 "conjunction test" or the minimal market capitalization test of \$15,000,000.¹²

Some companies operating under a Plan are able to return to full compliance with continued listing standards (or are able to demonstrate an ability to meet original listing standards) well before the expiration of the 18-month Plan period. In such circumstances, the Exchange will deem the Plan period over, although it will wait to see that the reestablished standard is maintained for two quarters before doing so. This *early* Plan termination, however, will not be made available to a company that only achieves compliance by meeting the alternative criteria described in clauses (ii) and (iii) to Footnote C of Section 802.01B.

Finally, under the existing Plan process described in Sections 802.02 and 802.03 of the *Manual*, a company is in a sense "on probation" for 12 months after the end of a successfully-implemented Plan. Under the proposed rule change, the Exchange will measure those 12 months from the early termination date when that occurs.

Price Criteria. Section 802.01C currently provides that a company must cure a \$1.00 price condition by bringing its 30 trading-day average share price above \$1.00 within six months, or by the company's next annual meeting date, whichever is later. The Exchange, however, represents that it always intended that the company would not only restore its 30-day average share price, but also its closing price, to above \$1.00 by the target date. The Exchange also represents that Section 802.01C's option of giving a company until its next annual meeting to bring its average share price back above \$1.00 was intended to accommodate a company that intended to cure the price condition by taking an action requiring the approval of its stockholders; in this case, the company would then need at least some trading time following the approval of the reverse split to evidence the increase in the share price. The proposed rule change amends the

¹² For example, if a Footnote C Company had returned to compliance by achieving a market capitalization of \$60,000,000 and stockholders' equity of \$40,000,000, that company would be considered in compliance with continued listing standards, unless both its market capitalization and total stockholders' equity were less than \$50,000,000, or unless its minimal market capitalization was less than \$15,000,000. Telephone conversation between James F. Duffy, Senior Vice President and Associate General Counsel, NYSE; Florence Harmon, Senior Special Counsel, Division, Commission; and Susie Cho, Special Counsel, Division, Commission, June 26, 2001.

Section so that the provisions read as originally intended by the Exchange.

Amendments to Rule 499

The proposed amendments to Exchange Rule 499 correspond with the proposed amendments to Section 802 of the *Manual*. Exchange Rule 499 also reflects certain previous amendments to Section 802 that were inadvertently omitted from the Rule.

2. Statutory Basis

The Exchange believes that the basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) that an exchange have rules that are 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, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will 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 Exchange has neither solicited nor received written comments on the proposed rule change.

III. 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW, Washington, DC 20549-0609. 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 Room. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR-

NYSE-2001-02 and should be submitted by July 24, 2001.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

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 exchange.¹³ Specifically, the Commission believes the proposal is consistent with Section 6(b)(5) of the Act,¹⁴ which requires that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and in general, to protect investors and the public.

The amendments to Sections 102 and 103 of the *Manual* reflect a modification to GAAP and will bring uniform accounting principles to the process of determining eligibility under the Exchange's earnings criteria for original listing of domestic and foreign issuers. Regarding the numerical criteria of Section 802.01B, the Commission believes that it is reasonable for the Exchange to apply the global market capitalization/total stockholders' equity standard over a consecutive 30 trading-day period, as is currently specified for the \$15,000,000 market capitalization test. The Commission also believes that it is reasonable for the Exchange to apply to limited partnerships and REITs the same \$15,000,000 market capitalization-only test that is applied to closed-end funds, since in its experience implementing the criteria, the Exchange has observed that stockholders' equity is not a useful measure when applied to limited partnerships or REITs listed on the Exchange.

In addition, the Commission believes that the amendments to Section 802.01C regarding price criteria are a reasonable means of effectuating the Exchange's original intent. The Exchange had intended that a company with an average closing price less than \$1.00 over a consecutive 30 trading-day period would not only restore its 30-day average share price, but also its closing price, to above \$1.00 by the target date. The Exchange also represents that Section 802.01C's option of giving a company until its next annual meeting to bring its average share price back

above \$1.00 was intended to accommodate a company that intended to cure the price condition by taking an action requiring the approval of its stockholders; in this case, the company would then need at least some trading time following the approval of the reverse split to evidence the increase in the share price. The proposed rule change clarifies these points.

The Commission also believes that the modifications to the Plan process under Sections 802.02 and 802.03 strike a permissible balance between the Exchange's obligation to protect investors and their confidence in the market, with its parallel obligation to perfect the mechanism of a free and open market. The alternate recovery measures by which a company may return to compliance with continued listing standards are explicitly delineated, providing greater transparency to the Plan process and sustaining investor confidence in the integrity of the markets.

The Commission, however, specifically notes that the Footnote C Companies fall under a unique category vis-à-vis other companies regarding the application of the 18-month Plan process. For example, even with the alternative recovery measures in place, the Exchange will still require a company to provide a financial Plan that addresses how the company will restore both its market capitalization and stockholders' equity to the \$50,000,000 level. In the instance where a company is eligible for early termination of its Plan, the NYSE has established a concrete time period during which the company must maintain its re-established continued listing standards before termination of the Plan. This early Plan termination, however, will not be made available to a company that only achieves the alternative criteria set forth in clauses (ii) and (iii) to Footnote C of Section 802.01B.

Moreover, under the existing Plan process described in Sections 802.02 and 802.03 of the *Manual*, a company is in a sense "on probation" for 12 months after the end of a successfully-implemented Plan. In the order approving this probation period provision, the Commission stated that "the [provision] would allow the Exchange to scrutinize a company's recovery tactics if the company emerges from being below continued listing standards but then falls below continued listing standards within 12 months. In such a case, the Exchange could truncate the evaluation and follow-up procedures for companies falling below maintenance standards.

Furthermore, if a company meets any of the "other" delisting criteria, the proposal would permit the Exchange to require that the company immediately comply with the evaluation and follow-up procedures outlined in the *Listing Manual*. In enhancing its market, the NYSE has determined to remove stocks that repeatedly fall below continued listing standards. The Commission believes that to uphold the quality of its market, it is reasonable for the NYSE to implement a procedure that allows it to abridge the follow-up procedure after it has evaluated a company's situation."¹⁵

The one-year probation period was therefore intended as a monitoring period to ensure that companies stay above the continued listing criteria. The Commission stresses that Footnote C Companies should not view the one-year probation period as an extension of the 18-month Plan period and an opportunity to gain additional time to achieve compliance. Absent extraordinary circumstances, the Commission expects the Exchange to suspend and institute delisting proceedings for the security of any Footnote C Company that falls below the Footnote C criteria during the one-year probation period.

The NYSE has requested that the Commission find good cause for approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of notice in the **Federal Register**. The Commission believes that it is reasonable to grant accelerated approval to allow for the efficient administration of the Exchange's original and continued listing programs as promptly as possible. Accordingly, the Commission finds good cause, consistent with Sections 6(b)(5) and 19(b)(2) of the Act.¹⁶

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁷ that the proposed rule change, SR-NYSE-2001-02, as amended, is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁸

Margaret H. McFarland,
Deputy Secretary.

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¹⁵ Securities Exchange Act Release No. 42194 (December 1, 1999), 64 FR 69311 (December 10, 1999).

¹⁶ 15 U.S.C. 78f(b)(5) and 78s(b)(2).

¹⁷ 15 U.S.C. 78s(b)(2).

¹⁸ 17 CFR 200.30-3(a)(12).

¹³ In approving this rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁴ 15 U.S.C. 78f(b)(5).