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, 450 Fifth Street, N.W., Washington, D.C. 20549–0609. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR–CBOE–98–54 and should be submitted by May 24, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary

[FR Doc. 99–10985 Filed 4–30–99; 8:45 am]

BILLING CODE 8010–01–U

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41324; File No. SR–NYSE–99–13]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 by the New York Stock Exchange, Inc. Relating to Amendments to the Listed Company Manual Regarding Original and Continued Listing Criteria and Procedures

April 22, 1999.

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 March 31, 1999, 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, II, and III below, which Items have been prepared by the Exchange. On April 21, 1999, the Exchange submitted Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The proposed rule change consists of amendments to the Listed Company Manual (''Manual'')[3] with regards to the original and continued listing criteria and procedures of the Exchange. The text of the proposed rule change follows. New text is italicized. Deleted text is bracketed.

NYSE Listed Company Manual

* * * * *

Section 1

The Listing Process

101.00 Introduction

* * * * *

The Exchange has broad discretion regarding the listing of a company. The Exchange is committed to list only those companies that are suited for auction market trading and that have attained the status of being eligible for trading on the Exchange. Thus, the Exchange may deny listing or apply additional or more stringent criteria based on any event, condition, or circumstance that makes the listing of the company inadvisable or unwarranted in the opinion of the Exchange. Such determination can be made even if the company meets the standards set forth below.

102.01 Minimum Numerical Standards

—Domestic Standards [Companies]
—Equity Listings

102.01A. A company must meet one of the following size/volume criteria:

* * * * *

102.01B. A company must demonstrate an [A]aggregate market value of publicly-held shares [(C) , subject to adjustment depending on market conditions, as described below]......[$40,000,000] *of $60,000,000 for companies that list either at the time of their initial public offerings (''IPOs'') (C) or as a result of spin-offs, and $100,000,000 for other companies (D).*

[(While greater emphasis is placed on market value, an additional measure of size is $40,000,000 in net tangible assets.)]

* * * * *

(C) For companies that list at the time of their IPOs, the Exchange will rely on a written commitment from the underwriter to represent the anticipated value of the company's offering in order to determine a company's compliance with this listing standard. Similarly, for spin-offs, the Exchange will rely on a representation from the parent company's investment banker (or other financial advisor) in order to estimate the market value based upon the as disclosed distribution ratio. For purpose of this paragraph, an IPO is an offering by an issuer which, immediately prior to its original listing, does not have a class of common stock registered under the Securities Exchange Act of 1934. An IPO includes a carve-out, which is defined for purposes of this paragraph as the initial offering of an equity security to the public by a publicly traded company for an underlying interest in its existing business (which may be a subsidiary, division, or business unit).

[C] *(D)* Shares held by directors, officers, or their immediate families and other concentrated holdings of 10 percent or more are excluded in calculating the number of publicly-held shares. *If a company either has a significant concentration of stock, or changing market forces have adversely impacted the public market value of a company which otherwise would qualify for listing on the Exchange, such that its public market value is no more than 10 percent below $60,000,000 or $100,000,000, as applicable, the Exchange will generally consider $60,000,000 or $100,000,000, as applicable, in stockholders' equity as an alternate measure of size and therefore as an alternate basis on which to list the company.*

* * * * *

[Calculation of Aggregate market Value Adjustment—On January 15 and July 15 of each year the NYSE Composite Index, at the close of business for that date, or on the next succeeding business day if the Exchange is closed, is divided by the base value of 55.06 (the NYSE Composite Index for July 15, 1971). The $40,000,000 standard multiplied by the adjustment factor as so calculated (after rounding up to the nearest thousandth). The resulting product is rounded to the nearest $100,000.

The adjustment is made only when the NYSE Composite Index is lower than that of the base value, and is limited to a maximum reduction of 50 *percent* of the standard which will be in effect for the succeeding six months following the calculation.

Since the NYSE Composite Index has remained above 55.06 in recent years, no adjustment has been necessary]

* * * * *

[Demonstrated earning power—income before federal income taxes and under competitive conditions:

Latest fiscal year	$2,500,000
Each of the preceding two fiscal years	$2,000,000

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[12] 17 CFR 200.30–30(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] The Exchange notes that it has a pending filing to make certain amendments to its listing standards (SR–NYSE–98–21). The instant filing is marked against the Manual in its current form, not the Manual as proposed to be amended in the already pending filing.

OR

Demonstrated earning power—income before federal income taxes and under competitive conditions:

Aggregate for last 3 fiscal years	$6,500,000
together with	
A minimum in most recent fiscal year	$4,500,000

(All three years must be profitable.)

OR

For companies with not less than $500,000,000 market capitalization and $200,000,000 revenues in the most recent fiscal year:

Demonstrated earning power—adjusted net income*:

Aggregate for last 3 fiscal years—$25,000,000

(Each year must report a positive amount.)]

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

(I) (1) Pre tax earnings from continuing operations and after minority interest 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.

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

(a) Application of Use of Proceeds.

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

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

(ii) Fund an acquisition.

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

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

(b) Acquisitions and Dispositions

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

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

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

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

(1) Costs of severance and termination benefits

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

(3) Costs to consolidate or re-locate plant and office facilities

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

(ii) Environmental clean-up costs

(iii) Litigation settlements

(e) Exclusion of Impairment Charges on Long-lived Assets (goodwill, property, plant, and equipment, and other long-lived assets)

(f) Exclusion of Gains or Losses Associated with Sales of a Subsidiary's or Investee's Stock

(g) Exclusion of In-Process Purchased Research and Development Charges

(h) Regulation S–X Article 11 Adjustments

Adjustments will include those contained in a company's pro forma financial statements provided in a current filing with the SEC pursuant to SEC rules and regulations governing Article 11 ''Pro forma information of Regulation S–X Part 210—Form and Content of and Requirements for Financial Statements.''

(i) Exclusion of the Cumulative Effect of Adoption of New Accounting Standard (APB Opinion No.20)

OR

(II) A Company with not less than $500,000,000 market capitalization and $200,000,000 in revenues during the most recent 12 month period must demonstrate from the operating activity section of its cash flow statement that its cash flow, which represents net income adjusted to (a) reconcile such amounts to cash provided by operating activities, and (b) exclude changes in operating assets and liabilities, is at least

$25,000,000 in the aggregate for the last three fiscal years, and each year is reported as a positive amount as adjusted (E)(F) pursuant to Para. 102.01C (I)(2)(a) and (b) as applicable. With respect to reconciling amounts pursuant to this Paragraph, all such amounts are limited to the amount included in the company's income statement.

(E) Only adjustments arising from events specifically so indicated in the company's SEC filing(s) as to both categorization and amount can and must be made. Any such adjustment applies only in the year in which the event occurred except with regard to the use of proceeds or acquisitions and dispositions. Any company for which the Exchange relies on adjustments in granting clearance must include all relevant adjusted financial data in its listing application as specified in Para. 702.04, and disclose the use of adjustments by including a statement in a press release (i) that additional information is available upon which the NYSE relied to list the company and is included in the listing application and (ii) that such information is available to the public upon request.

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

102.01D. Policy on restated financial statements due to a change from an unacceptable to acceptable accounting principle or a correction of errors

If at any time following the Exchange's initial determination that a company meets the Exchange's original listing criteria, the company restates its financial statements due to a change from an unacceptable to an acceptable accounting principle or a correction of errors, and the restatement encompasses financial statements included in its SEC filings at the time of application for listing on the Exchange, the Exchange will re-evaluate the company's listing status. In this regard, the Exchange will determine whether, at the time of the original clearance, the company would have qualified under the Exchange's original listing standards utilizing the restated financial data. If not, unless the company meets original listing standards at the time of the restatement, the company will be notified that it does not meet the original listing standards and, if its securities have been listed, such securities will be suspended from trading and the company will immediately be subject to the delisting procedures in Para. 804.

[*Net income, adjusted to remove the effects of all items whose cash effects are investing or financing cash flows (determined pursuant to paragraph 28(b) of Statement of Financial Accounting Standards No. 95, Statement of Cash Flows, subject to the following limitations: the adjustment to net income with respect to the cash effects of discontinued operations, the cumulative effect of an accounting change, an extraordinary item or the gain or loss on extinguishment of debt will be limited to reversing the amount charged or credited in determining net income for the period.)

The adjusted net income standard is designed to provide the opportunity for substantial companies that are valued more on the basis of ''cash flow'' than reported income to list on the Exchange. The NYSE will consider each company on a case by case basis and will look not only at the specifics of the company's business but will also look to its industry, peer group and other relevant factors in performing its due diligence with respect to the application of this standard.]

102.05 Minimum Numerical Standards—Real Estate Investment Trusts

For Real Estate Investment Trusts (REITs) that do not have a three-year operating history, the following listing standards apply:

- *For such companies with at least $60,000,000 in stockholders' equity, the Exchange will generally authorize the listing of the REIT. For those REITs listing in conjunction with an offering, this requirement must be evidenced by a written commitment from the underwriter (or, in the case of a spin-off or carve-out, from the parent company's investment banker or other financial advisor) on behalf of the REIT;*
- *For such companies with stockholders' equity below $60,000,000, the Exchange will not consider the REIT eligible for listing.*

* * * * *

103.00 Non-U.S. Companies

* * * * *

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

103.01A. A company must meet the following distribution and size requirements:

[Distribution]

Number of shareholder, holders of 100 or more shares.	5,000 Worldwide
Number of shares publicly held.	2.5 million Worldwide
Market value of publicly-held shares *(A)*.	$100 million Worldwide *(B)*

(A) Shares held by directors, officers, or their immediate families and other concentrated holdings of 10 percent or more are excluded in calculating the number of publicly-held shares. If a company either has a significant concentration of stock, or if changing market forces have adversely impacted the public market value of a company which otherwise would qualify for listing on the Exchange such that its public market value is no more than 10 percent below $100,000,000, the Exchange will generally consider $100,000,000 in stockholders' equity as an alternate measure of size and therefore, as an alternative basis to list the company.

(B) For companies that list at the time of their initial public offerings (''IPOs''), if necessary, the Exchange will rely on a written commitment from the underwriter to represent the anticipated value of the company's offering in order to determine a company's compliance with this listing standard. Similarly, for spin-offs, the Exchange will rely on a representation from the parent company's investment banker (or other financial advisor) or transfer agent in order to estimate the market value based upon the as disclosed distribution ratio. For purpose of this paragraph, an IPO is an offering by an issuer which, immediately prior to its original listing, does not have a class of common stock registered under the Securities Exchange Act of 1934. An IPO includes a carve-out, which is defined for purposes of this paragraph as the initial offering of an equity security to the public by a publicly traded company for an underlying interest in its existing business (may be a subsidiary, division, or business unit).

[Size and Earnings

Net tangible assets.	$100 million Worldwide
Pre-tax income ..	$100 million cumulative for latest 3 years with $25 million minimum for any one of the 3 years]

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

(I) (1) Pre tax earnings from continuing operations and after minority interest and equity in the earnings or losses of investees as adjusted (C)(D) for items specified in para. 102.01C(I)(2)(a) through (i) above, and 103.01B(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 three years.

(2) Additional Adjustment Available for Foreign Currency Devaluation. Non-operating adjustments when associated with translation adjustments representing a significant devaluation of a country's currency (e.g., the currency of a company's country of domicile devalues by more than 10 percent against the U.S. dollar within a six-month period). Adjustments may not include those associated with normal currency gains or losses.

OR

(II) Companies with not less than $500,000,000 market capitalization and $200,000,000 revenues in the most recent 12 month period must demonstrate from the operating activity section of its cash flow statement that its operating cash flow excluding changes in operating assets and liabilities is at least $25,000,000 in the aggregate for the last three fiscal years, where each year is reported as a positive amount as adjusted (C)(D) for Para. 102.01C(I)(2) (a) and (b).

(C) Only adjustments arising from events specifically so indicated in the company's SEC filing(s) as to both categorization and amount can and must be made. Any such adjustment applies only in the year in which the event occurred except with regard to the use of proceeds or acquisitions and dispositions. Any company for which the Exchange relies on adjustments in granting clearance must include all relevant adjusted financial data in its listing application as specified in Para. 702.04, and disclose the use of adjustments by including a statement in a press release (i) that additional information is available upon which the NYSE relied to list the company and is included in the listing application and (ii) that such information is available to the public upon request.

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

103.01C. Policy on restated financial statements due to a change from an unacceptable to acceptable accounting principal or a correction of errors

If at any time following the Exchange's initial determination that a company meets the Exchange's original listing criteria, the company restates its financial statements due to a change from an unacceptable to an acceptable accounting principle or a correction of errors, and the restatement encompasses financial statements included in its SEC filings at the time of application for listing on the Exchange, the Exchange will re-evaluate the company's listing status. In this regard, the Exchange will determine whether, at the time of the original clearance, the company would have qualified under the Exchange's original listing standards utilizing the restated financial data. If not, unless the company meets original listing standards at the time of the restatement, the company will be notified that it does not meet the original listing standards and, if its securities have been listed, such securities will be suspended from trading and the company will immediately be subject to the delisting procedures in Para. 804.

* * * * *

Section 7

Listing Applications

* * * * *

702.04 Supporting Documents

* * * * *

Financial Statements—

* * * * *

Adjustments to historical financial data—

If the Exchange requires any adjustments to historical financial data submitted by the company during the financial eligibility review process and such data is necessary to demonstrate that the company meets the Exchange's listing standards, the company must include such data in its listing application. Exchange Staff will advise the company as to which, if any, adjustments to historical financial data submitted to it by the company must be included in the listing application. Such information must include the agreed upon procedures report, if any, submitted to the Exchange.

* * * * *

Section 8

Suspension and Delisting

* * * * *

801.00 Policy

* * * * *

In connection with this rule, the Exchange has adopted certain quantitative and qualitative continued listing criteria. When a company falls below any criterion, the Exchange will review the appropriateness of continued listing. The Exchange may give consideration to any definitive action that a company would propose to take that would bring it [in line with original listing standards] *above continued listing standards. The specific procedures and timelines regarding such proposals are delineated in Para. 802.02 and 802.03.* [However, changes that a company might consider or make that would bring it above continued listing standards but not in line with original listing standards would normally not be adequate reason to warrant continued listing.]

* * * * *

802.00 Continued Listing [Criteria]

802.[00] *01 Continued Listing Criteria*

* * * * *

Earnings—

• Aggregate market value of shares outstanding (excluding treasury stock) is less than	$12,000,000
and average net income (*A*) after taxes for past 3 years is less than	$600,000
• Net tangible assets available to common stock are less than	$12,000,000
and average net income (*A*) after taxes for past 3 years is less than	$600,000

(A) For a company that included in its original listing application adjustments to historical financial data, during the first three years following the date of its original listing, the Exchange will calculate the company's average net income after taxes for any year considered in assessing its qualification for listing taking into consideration those specific adjustments made to the company's historical financial data for that year in the original listing application.

802.02 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 Para. 802.01, 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. 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. 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. In any event, if the company does not meet continued listing standards at the end of the 18-month period, the Exchange promptly will initiate 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 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, 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 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. 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. 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 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 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. In any event, if the company does not meet continued listing standards at the end of the 18-month period, the Exchange will promptly initiate suspension and delisting procedures.

NYSE Rules

Delisting of Securities

Suspension from Dealings or Removal from List by Action of the Exchange

The aim of the New York Stock Exchange is to provide the foremost auction market for securities of well-established companies in which there is a broad public interest and ownership.

Rule 499.

.20 NUMERICAL AND OTHER CRITERIA.—WHEN A COMPANY FALLS BELOW ANY OF THESE CRITERIA, THE EXCHANGE MAY GIVE CONSIDERATION TO ANY DEFINITIVE ACTION THAT A COMPANY WOULD PROPOSE TO TAKE THAT WOULD BRING IT *ABOVE CONTINUED LISTING STANDARDS.* [IN LINE WITH ORIGINAL LISTING STANDARDS. ON THE OTHER HAND, CHANGES THAT A COMPANY MIGHT CONSIDER OR MAKE THAT WOULD BRING IT ABOVE THE DELISTING CRITERIA BUT NOT IN LINE WITH ORIGINAL LISTING STANDARDS WOULD NORMALLY NOT BE ADEQUATE REASON TO WARRANT CONTINUED LISTING.]

* * * * *

.50 [Procedure for Delisting.—] *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 Para. 802.01, 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. 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. 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. In any event, if the company does not meet continued listing standards at the end of the 18-month period, the Exchange promptly will initiate suspension and delisting procedures.

.60 [Procedure for Delisting.—] *Continued Listing Evaluation and Follow-up Procedures for Non-US 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 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, 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 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. 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. 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 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 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. In any event, if the company does not meet continued listing standards at the end of the 18-month period, the Exchange will promptly initiate suspension and delisting procedures.

.70 Procedure for Delisting.—

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to clarify and codify how the Exchange evaluates a company's listing eligibility, codify the Exchange's application and interpretation of certain original listing standards, change the benchmark used as an alternate measure of size, codify its original listing standard for real estate investment trusts, and codify both existing and enhanced procedures applicable to companies identified as being below the Exchange's continued listing criteria. Where applicable, conforming changes are proposed regarding non-U.S. listings. In proposing these rule codifications and changes, the Exchange seeks to ensure that its original and continued listing standards are fully transparent, applied consistently and easily auditable.

Original Listing Criteria and Procedures. The Exchange's numerical listing criteria include requirements regarding size, earnings and share distribution of a company. With regard to the size component of the financial eligibility criteria, and general eligibility, the Exchange proposes to make four amendments:

- The proposed amendment clarifies and codifies the Exchange staff's authority to delve further into the suitability of the applicant company for auction market trading on the Exchange even if the applicant meets the Exchange's quantitative criteria. The Exchange notes that such authority is specifically codified in the suspension and delisting section of the Manual and believes that it is equally appropriate to codify its authority in the original listing section.
- The current original listing criteria include a requirement that a company have an aggregate market value of publicly-held shares of $40 million. The Exchange proposes to raise this requirement to $100 million for all listings other than spin-offs and initial public offerings (''IPOs'') (including carve-outs[4]), as to which the Exchange proposes raising the standard to $60 million. The Exchange proposes to raise the current $40 million standard somewhat less for IPOs, carve-outs and spin-offs because these are companies that have not had the opportunity to establish themselves as public companies.[5]
- The current additional measure of a company's size is a net tangible assets (''NTAs'') test. The Exchange proposes two changes:

a. First, the word ''additional in this context has been read by some to imply that NTAs are a stand-alone measure of size that must be met in addition to the market value standard. This reading was never intended. The Exchange clarifies that the test, as modified below, is an alternate measure of size to be relied upon in those instances where circumstances warrant an alternate measure and where the public market capitalization is no more than 10 percent below the public market value listing standard. Such circumstances would include occurrences such as large private holdings that drive down the public market capitalization or changing market forces that drive down the price of the stock.

b. Second, the Exchange proposes to replace the NTA test with a stockholders' equity test ($60 million for IPOs or spin-offs and $100 million for all other domestic listings[6] The Exchange views stockholders' equity as a better reflection of a company's value in the current economy, where a company's value often is not based solely on hard assets, but also on intangibles. The Exchange would, in reviewing a company, look to the composition of the stockholders' equity in order to determine the origination of such equity. Furthermore, stockholders' equity is a more straight-forward calculation than NTAs.

- The Exchange proposes to codify its practice of accepting a written commitment from the underwriter for IPOs (for spin-offs, from the parent company's investment banker or other financial advisor) to demonstrate that the company will satisfy the public market value requirement of $60 million ($100 million worldwide for non-U.S. issuers).

Original Financial Listing Criteria and Procedures. i. Overview and Discussion of Current Practice Regarding Financial Listing Standards.

In addition to specific criteria regarding the size of a listing applicant, the Manual also contains criteria regarding a company's earnings. The Exchange is proposing a series of amendments relating to this section of the Manual.

Under the current provisions of the Manual, a company that seeks to qualify for listing on the Exchange under its domestic standards must meet one of three financial tests. Two of the tests call for an analysis of the company's ''demonstrated earning power under competitive conditions.'' The third test, which only applies to companies with at least $500,000,000 in market capitalization and $200,000,000 in revenues during the most recent fiscal year, analyzes the company's ''demonstrated earning power—adjusted net income,'' as such latter term is defined in the current accompanying

[4] The Exchange proposes to define a carve-out as the initial offering of an equity security to the public by a publicly-traded company for an underlying interest in its existing business (which may be a subsidary, division, or business unit). In the case of a ''target stock,'' the security is treated in the same way as any other second class of stock of the issuer.

[5] The Exchange proposes to define an IPO as a company that, prior to its original listing did not have a class of common stock registered under the Act. The Exochange notes that this definition differs from the definition of an IPO in Section 12(f)(1)(G)(i) of the Act, which turns on whether a company has a reporting obligation under the Act prior to a stock offering. Because the Exchange is applying its definition of IPO in the context of the original listing of common stock, the Exchange believes it is more appropriate to focus on the existense of U.S. publicly-traded stock rather than on prior reporting requirement. For example, while a company could have a reporting requirement under the Act if it conducted a public sale of debt securities, that would not be relevant in considering the appropriateness of listing a company's first public class of common stock.

[6] For non-U.S. companies, the $100 million requirement applies to all issuers and will be measured under this proposal in stockholders' equity instead of the current NTA valuation.

footnotes. The Exchange proposes both to codify its current policies and practices with respect to the interpretation of these criteria and to amend certain of its policies. In doing so, the Exchange seeks to ensure that the financial criteria applied to companies seeking to list on the Exchange are fully transparent, applied consistently and easily auditable.

The Exchange seeks to ascertain the financial strength of the company as it will exist on the day of listing. For more than 60 years, it has been the policy and practice of the Exchange to give consideration to certain adjustments to assure that at the time of listing the company has the earnings capacity—the ''demonstrated earning power'' requisite to auction-agency trading of its securities on the Exchange.

In conducting its review of the financial condition of an applicant company, the Exchange historically relied upon financial statements presented to it by the company, both historical and pro forma; in many cases, such financial information included that obtained from SEC filings (*e.g.*, for an acquisition, pro forma financial statements may have been provided by the listing applicant acquiror and presented to Exchange staff from the relevant past SEC filings for the acquiree if it was a reporting company). Finally, if the Exchange relied on the adjustments in granting financial clearance to the company, the company would be required to include them in its original listing application as a condition to eligibility clearance. Thus, any adjustments were available to the public because the listing application is a matter of public record.

The Exchange has not accepted all pro forma adjustments presented by the listing applicant. Moreover, the Exchange has required pro forma adjustments from companies in instances where the outcome was not favorable to the company if the adjustments were considered necessary to accurately evaluate the company's financial eligibility.

While the Exchange believes that the current process has served investors and the listed company community well, the Exchange recognizes the need to provide more transparency as to the application of the financial criteria and the financial analysis used in the listing process. Thus, the proposed rule change sets forth more explicit standards and enumerates specifically the applicable adjustments. In addition, the proposed rule change makes conforming, clarifying changes to the non-U.S. financial listing standards in Section 103.01 of the Manual.

ii. Proposed Changes to Financial Eligibility Standards. *The proposed rule change codifies the Exchange's financial listing standards and current practices, as well as clarifies and modifies the relevant interpretations. The modifications have been made to ensure transparency, auditability, replicability and certainty in the application of the standards. In detailing its standards, the Exchange has sought to preserve its goal of analyzing the financial strength of a listing applicant as the entity will exist at the time of listing. Specifically, the Exchange seeks to continue to be able to determine whether the company in its current form is financially suited for trading on the Exchange, taking into account (1) changes in capitalization, (2) acquisitions completed or committed to, and (3) excluding certain items which, based upon the Exchange's experience, should not be considered in assessing earnings strength on a going forward basis, because, by their nature, they are not necessarily recurring.*

a. Standard #1—''Pre-Tax Adjusted Earnings. The Exchange proposes to replace its current requirement that applicants ''demonstrate earning power under competitive conditions'' with a standard providing more specificity. The proposed standard is ''pre-tax earnings from continuing operations and after minority interest and equity in the earnings or losses of investees as adjusted''. In turn, the ''as adjusted'' phrase refers the reader to various items that are a part of the test. Each element of the restated test is discussed separately below.

First, ''pre-tax earnings'' captures the current standard of ''income before federal income taxes.'' Thus, the Exchange proposes to continue to begin its analysis with a company's income before the application of all income taxes (state income taxes, although removed for NYSE analysis purposes in the past, have not materially altered any listing eligibility decision and, therefore, are now excluded as such) in order to create a picture of the company's gross income potential.

Second, ''from continuing operations'' focuses our analysis on ongoing operations and excludes any discontinued operations included in the company's historical financial statements. Discontinued operations by definition do not go forward and thus are not considered to be relevant to the entity being considered for listing. The Exchange notes that accounting rules specify that, upon management's commitment to discontinue an operation, financial statements for all relevant periods presented must be restated. Therefore, if the commitment is made after the period under Exchange review and the historical financial statements have not yet been restated, the Exchange will rely on the company to prepare this presentation of the adjusted data and accompany such presentation with an agreed upon procedures letter provided by the company's outside audit firm at the request of the company. The auditor's letter will state the procedures performed with respect to calculating the pre-tax earnings from continuing operations and after minority interest and equity in the earnings or losses of investees as adjusted giving effect to the discontinuance for each period under review.

Third, ''after minority interest'' removes results of an affiliate of the applicant company accrued to owners other than the applicant company due to its less than 100 percent ownership. The Exchange does not consider those results to be reflective of the equity interest in the security that would be trading on the Exchange. For example, in the case of a subsidiary that has a 20 percent privately held interest (*i.e.*, a 20 percent minority interest), only 80 percent of the interest in the subsidiary is reflected in the public stock. In this scenario, although 100 percent of the subsidiary is consolidated into the applicant parent's operations, only 80 percent of the subsidiary's earnings will accrue to common stock holders of the applicant parent company, as the 20 percent minority interest will be reflected as a liability on the company's books and removed from its consolidated operations. The Exchange would make the appropriate adjustment in its analysis to essentially include 80 percent of the earnings in the subsidiary by adjusting the pre-tax income for the reported minority interest provided such minority interest is not included as part of the company's pre-tax income on the face of the financial statement.[7]

Fourth, ''after equity in the earnings or losses of investees'' arises when an applicant company has an ownership interest in another corporation, the results of which are not consolidated into the applicant company's financial statements due to the application of the governing accounting principles. The Exchange considers these results to be part of the financial picture of the applicant company because they

[7] The Exchange notes that in the case of equity in the earnings or losses of investees, the reporting of the amount may not necessarily be included in ''pre-tax earnings'' but might be reported by the company below this presentation in its income statement. Accordingly, the Exchange would make the requisite adjustment for these amounts if necessary.

represent income or losses that will affect its income stream on an ongoing basis. Thus, any results of investments that accrue to the company will be accounted for in the Exchange's analysis to determine whether or not the company is eligible for listing in order to reflect all of the earnings accruing to the common shareholders. This will be effected by including these results from the company's income statement provided such results are not included as part of the company's pre-tax income on the face of the financial statement.

Fifth, the Exchange proposes to enumerate the adjustments to be made to the amount computed pursuant to the preceding four paragraphs. These adjustments would be part of the proposed standard and, as such, apply to every listing applicant. Applicant companies may only apply those adjustments arising from events specifically identified in the company's SEC filing(s) as to both categorization and amount. Thus, in order for an adjustment to be appropriately applied, it must be specifically identified and the amount applied must be specifically disclosed in the SEC filing, or subject to an agreed upon procedures letter in certain cases as discussed below. The following discussion itemizes and clarifies the Exchange's interpretation of the adjustments to be made to pre-tax income from continuing operations after minority interest and equity in the earnings and losses of investees.

The above-referenced adjustments are measured and recognized in accordance with the relevant accounting literature, such as that published by the Financial Accounting Standards Board (''FASB''), the Accounting Principles Board (''APB''), the Emerging Issues Task Force (''EITF''), the American Institute of Certified Public Accountants (''AICPA''), and the SEC.

Use of Proceeds. When the financial status of a company is evaluated in anticipation of an equity offering, whether an IPO or a secondary offering, the application of its intended use of proceeds to the company's historical financial statements can affect its ongoing earnings strength. Because it is this post-offering and recapitalized entity that is applying to list on the Exchange, its financial eligibility can best be analyzed by taking into account the application and intended use of the offering proceeds.

The Exchange has a long-standing policy of using the proceeds for all periods in determining the financial eligibility of a company seeking to list its securities on the Exchange. The company's registration documents (*e.g.*, Form S–1) often include pro-forma capitalization information that takes into effect the net proceeds and the ultimate intended use. The Exchange's practice is conceptually consistent with the Commission's rules governing pro forma statements, which permit the application and use of proceeds in the capitalization table with regard to deleveraging, and in the pro forma financial statement section of a registration statement with regard to both deleveraging and acquisitions and dispositions.

With respect to the scope of the application, however, the Exchange has a three-year eligibility review period and evaluates companies accordingly. In reviewing a company's historical results, the Exchange will continue to consider the effect of the offering on that three-year review period where the proceeds are used to pay existing indebtedness or to fund an acquisition. Thus, for a company that is in registration with the SEC and is in the process of an equity offering, the Exchange proposes to give effect to the pro forma presentation in the registration statement and to continue to give effect to the net proceeds of that offering, and its specified intended application, in two circumstances— deleveraging and acquisitions and dispositions.

With regard to use of proceeds for deleveraging, the Exchange's practice is to analyze the financial data that reflect the recapitalized entity seeking to qualify for listing on the Exchange. In doing so, because a recapitalization can fundamentally change the financial viability of a company, the Exchange will conduct its review as if the recapitalization occurred on the first day of the first year of its three-year analysis. In applying the standard, the actual historic interest paid each year on the debt to be retired by the application of the proceeds will be removed, and the principal amount of the debt will be retired. The pro forma effects of the deleveraging for the latest fiscal year and the interim period will be reflected in the company's SEC filing. If that specific debt was incurred prior to that period, the company would need to prepare adjusted financial statement data to account for the relevant preceding periods. Adjustments will not be made on any interest or principal payment(s) made on indebtedness other than that specifically being retired. To ensure reliability and accuracy of the adjusted data, the Exchange proposes to require that this adjustment be accompanied by an agreed upon procedures letter provided by the company's outside audit firm at the request of the company. The auditor's letter will state the procedures performed with respect to: (1) The existence of the debt and (2) the accuracy of the adjustments applied to the company's historical pre-tax earnings reflecting the retirement of the principal amount of the debt and the actual historic interest payments made.

Similarly, with regard to use of proceeds for acquisitions, the Exchange conducts its review as if the acquisition occurred on the first day of the first year of its analysis, provided the historical financial statements of the acquiree for such period are included in the company's SEC filings. The starting point for this analysis is the company's SEC filing, which will include a pro forma presentation for the latest fiscal year and the subsequent interim period. This pro forma presentation will give effect to those acquisitions that meet the significance test of SEC Rule 3–05 of Regulation S–X (''Rule 3–05''). Generally, the historical financial statements of the acquiree included in the filing also will be limited to the requisite periods disclosed pursuant the Rule 3–05 significance test.[8]

The second step of the analysis is to review the historical financials of the company included in the registration statement and record the acquisition as if it was consummated on the first day of the earliest fiscal year included in the acquiree's financial statements presented in the filing. The requisite document preparation entails combining the historical results of the company with the historical results of the acquiree and reflects the purchase accounting of the acquisition for the periods presented. Specifically, the adjustments would be limited to the combination, as well as (1) the allocation of the purchase price including adjusting assets and liabilities of the acquiree to fair value recognizing any intangibles (and associated amortization and depreciation) and (2) the effects of any additional financing to complete the acquisition.

The Exchange notes that the heading ''acquisitions'' encompasses the purchase of complete companies, divisions, subsidiaries, and underlying equity interests. For instance, if company A intends to use proceeds from an offering to acquire company B, and company B has a division that will not be part of the transaction, then company B's financial statements excluding that division would be relevant financials of the acquiree. In

[8] The Exchange notes that, depending upon the industry group of the listed company, other SEC rules and regulations may govern this concept. For example, real estate operations would be guided by SEC Rule 3–14 of Regulation S–X.

sum, if an acquisition includes only a portion of a company or if, as part of a transaction, the acquiror simultaneously discontinues a portion of the acquiree, the net purchase effect would be deemed to be the acquisition component applicable to the Exchange's financial review during the full applicable review period (*i.e.*, for all periods presented in the SEC filing).

As in the deleveraging analysis described above, to ensure reliability and accuracy of the adjusted data provided, the Exchange proposes to require that these adjustments, if not set forth in the SEC filing, be accompanied by an agreed upon procedures letter provided by the company's outside audit firm at the request of the company. The auditor's letter would state the procedures performed with respect to showing the effect of the relevant acquisition on the applicant company.

In conclusion, the proposed process of giving effect to the use of proceeds of an offering to fund an acquisition or pay down existing debt differs from current practice in four respects: (1) all historic annual financial statements used in the analysis will be included in the SEC filing, (2) the Manual will contain a concise, transparent guideline as to both when and for how many periods adjustments will be made, (3) the financial data and related adjustments used in the eligibility analysis will be limited to the four corners of the SEC filing, and (4) an agreed upon procedures letter will be required with respect to use of proceeds and acquisitions.

Acquisitions and Dispositions. In instances other than those associated with the use of proceeds, the Exchange proposes to limit its analysis to those acquisitions and dispositions that are disclosed as such in a company's financial statements in accordance with Rule 3–05 and Article 11–01(b)(2) of Regulation S–X. Unlike the use of proceeds to fund an acquisition, in this instance, the adjustment for the acquisition or disposition will be limited to those periods for which pro forma financial data are presented in the SEC filing. The analysis again begins with the pro forma presentation prepared in accordance with Article 11 of Regulation S–X and included in the company's SEC filing. Depending upon the significance test of Rule 3–05, the company's SEC filing will have a number of periods of historical financial statements of the acquiree. The filing also will have certain pro forma presentations that vary in their specificity depending upon the significance test of Rule 3–05.

For purposes of conducting the financial eligibility review, if there is a pro forma presentation included in the company's SEC filing that does not specify pre-tax earnings from continuing operations, minority interest, and equity in the earnings or losses of investees, the company must prepare the relevant data. As with the use of proceeds in the context of an acquisition, the presentation of the adjusted data will need to be accompanied by an agreed upon procedures letter provided by the company's outside audit firm at the request of the company. The auditor's letter will state the procedures performed with respect to showing the effect of the expansion of the pro forma presentation from the SEC filing into a more comprehensive income statement that contains the itemizations necessary for the Exchange to conduct its analysis (*i.e.*, pre-tax earnings from continuing operations after minority interest and equity in the earnings or losses of investees). If no detailed disclosure is provided for a particular acquisition or disposition, and the acquisition or disposition is only a factual, non-material, un-quantified reference, then the acquisition or disposition will not be given effect because it cannot be substantiated within the four corners of the company's SEC filing.

In the event that the applicant company has less than three years of operating history and is acquiring (either completed or committed) an entity with the requisite operating history, the Exchange will consider the combined operating history of the acquiror and acquiree for the preceding period(s) in conducting its financial eligibility review. If it is necessary to combine historical financial statements of the acquiree and aquiror in order to enable the Exchange to conduct its analysis (*e.g.*, overlapping fiscal years), then the combined data would need to be accompanied by an agreed upon procedures letter provided by the company's outside audit firm at the request of the company. The auditor's letter will state the procedures performed with respect to any necessary combination of historical data.

The Exchange notes that, in conducting a financial eligibility review for a company with an acquisition or disposition (either completed or committed), the agreed upon procedures letter will not be required if the SEC filing under review makes it self-evident that the company would qualify for listing on the Exchange irrespective of the acquisition or disposition. Thus, if the filing on its face shows that the company would qualify both before and after using proceeds to consummate the acquisition (*e.g.*, a de minimus acquisition or an acquisition where both entities independently qualify for listing), an agreed upon procedures letter would not be required. Similarly, for other acquisitions or dispositions, if the filing on its face shows that the company would qualify on both a stand-alone and combined basis, an agreed upon procedures letter would not be required. For instance, if the combined entity resulting from two major companies, each of which have several hundred million dollars in market capitalization and no losses over the past three years, was to be subject to an original listing eligibility review, the Exchange would be unnecessarily imposing a cost and burden upon the applicant entity by requiring the company to provide an agreed upon procedures letter to the Exchange, provided there was no other information that would lead the Exchange to another conclusion.

Merger or Acquisition Related Costs Recorded under Pooling of Interests. The Exchange proposes to exclude legal and accounting fees and other costs incurred by a company in effecting a merger or acquiring another entity accounted for as a pooling of interests (whether or not the transaction is consummated). When the transaction is accounted for under the pooling of interests method, merger and acquisition costs are recorded on the company's income statement. To remove the effect of this transaction from the company's financial statements, the company will make the requisite adjustment. For business combinations requiring purchase accounting, there is no need to separately address this issue as the cost does not affect the company's current income (the cost is considered part of the purchase price and any goodwill is amortized prospectively over the appropriate amoritization period).

Certain Charges or Income Specifically Disclosed in the Filing. Consistent with past practice, the Exchange proposes to exclude several items in assessing the applicant company's earnings strength or its cash flow. These items have been excluded either because they are associated with a company's adopted exit plan as defined in the accounting literature or, based on the Exchange's experience in assessing ongoing earnings strength, they are not necessarily recurring. Thus, the Exchange has found that making adjustments for these items presents a more accurate picture of the applicant company's earnings strength on a going forward basis. The items subject to adjustment are somewhat more limited than those previously considered by the Exchange. In the interest of enhancing the transparency of the listing standards, the list of adjustments has been limited to those that can be objectively defined.

—Charges or Income Related to an Adopted Exit Plan

When a company adopts a specified exit plan, the charges or income of four items, if disclosed in the company's SEC filing, recorded in the company's financial statements in accordance with GAAP, and associated with the implementation of that plan, would be excluded by the Exchange in its proposed financial analysis: first, the costs of severance and termination benefits that are incurred as part of an exit plan (*e.g.*, involuntary termination of employees associated with a corporate down-sizing); second, costs and associated revenues and expenses associated with the elimination or reduction of product lines for which an exit plan has been adopted; third, costs incurred to consolidate, close, or re-locate plant or office facilities associated with an exit plan; and fourth, loss or gain on disposal of long-lived assets, which, by its definition, relates to assets that will no longer be held by the company.

—Environmental Clean-Up Costs

Environmental clean-up costs incurred in the remediation of environmental problems would be removed from the company's historical financial results. However, companies may not make adjustments for annual maintenance or on-going costs of compliance with environmental laws.

—Litigation Settlements

Litigation settlement costs, including any settlement amounts, interest payments and penalties so disclosed in a company's filings would be removed from the company's historic financial results. Companies may not make an adjustment for on-going, customary legal fees.

Impairment Charges on Long-lived Assets. Asset write downs that reflect the net realizable value of a long-lived asset (*e.g.*, property, plant and equipment, and goodwill) would be excluded from historic financial results. For instance, company A previously acquires company B and, at that time, establishes goodwill of $100 million. Two years later, company B's business significantly deteriorates. The recoverability of the previously recorded $100 million in goodwill can no longer be fully realized and the company determines that the net realizable amount is $60 million. The $40 million difference would represent the impairment charge (less any amortization to date). Because current assets are more likely to be operating assets, and thus akin to the day-to-day working capital of the company, no adjustment is made for any loss in their value. For instance, a company may not take write-downs on inventory or loans.

Gains or Losses Associated with Sales of a Subsidiary's or Investee's Stock. If a company has an ownership interest in another entity, or has a wholly-owned subsidiary, any gain or loss associated with the sale of all or part of the company's interest would be excluded from the company's historic results. For instance, if an applicant company owns 30 percent of another entity, for which it paid $1 million, the company has a cost basis of $1 million representing the purchase price of the acquisition. Were the company to sell that interest for $2 million, it would not be permitted to include that $1 million gain in the adjusted earnings submitted to the Exchange for evaluation of the company's financial eligibility status. These types of gains or losses would be reported separately by the company as non-operating items.

In Process Purchased Research and Development Charges. Purchased in-process research and development represents the value assigned in a purchase business combination to research and development projects of the acquired business that were commenced, but not yet completed, at the date of acquisition, and which, if unsuccessful, have no alternative future use in research and development activities or otherwise. Amounts assigned to purchased in-process research and development meeting this description must be charged to expense at the date of consummation of the business purchase combination. The Exchange will exclude this charge from a company's historical financial results.

Regulation S–X Article 11 Adjustments. Pro forma adjustments contained in a company's pro forma financial presentation provided in a current filing with the SEC are required to be made in accordance with SEC rules and regulations governing Article 11 ''Pro forma information of Regulation S–X Part 210—Form and Content of and Requirements for Financial Statements.'' The Exchange will review the company's financial statements in the context of any such adjustments, which are subject to SEC review. These adjustments would be limited to the current registration statement as to types of adjustments, amounts and years disclosed (except for use of proceeds as discussed above).

Adoption of New Accounting Standard. When an accounting rule is changed, a company may adopt it prospectively or record the cumulative effect of the adjustment. Typically, when the new rule is announced, it is either specifically indicated that the implementation must be cumulative or companies are given the option regarding implementation. When the adoption of a new standard results in a cumulative effect of the accounting standard, the company will take a charge in the current year to make up for all past years as if the change had been previously in place. The effect of change in accounting principle disclosed in accordance with APB 20 is excluded from the company's financial statement for purposes of the Exchange's review.

b. Standard #2—''Adjusted Cash Flow''. In addition to the Pre-Tax Adjusted Earnings standard discussed above, a second standard is available to companies with at least $500 million of market capitalization and $200 million of revenues in the most recent 12 month period. Companies that meet the size criteria may, in the current Manual, use an ''adjusted net income'' test, as that term is defined in the current accompanying footnote, of an aggregate for the last three years of at least $25 million with all years being positive.

The Exchange proposes to restate the standard applicable to the companies meeting the above-stated $500 million/ $200 million threshold to make the standard more transparent by incorporating the fundamental aspects of the footnote in the current Manual into the standard itself. In addition, the standard will explicitly indicate that the test includes adjustments for two purposes: the use of proceeds and acquisitions. Both of these categories of adjustments are discussed in detail in the discussion of the ''Pre-Tax Adjusted Earnings'' standard discussed above. The Exchange is proposing to limit the adjustments incorporated into this standard because the remaining adjustments may or may not have cash-flow implications for a particular company. Those that do have a cash flow effect will already have been accounted for in the operating activity section of the company's cash flow statement.

Policy Clarifications. The Exchange is also proposing to adopt several policies clarifying the use of the adjustments enumerated above, requiring the issuance of a press release by companies whose adjusted financial data were relied upon by the Exchange in granting eligibility clearance, and delineating the consequences of restated financial statements.

First, all adjustments must be disclosed as such in the SEC filing of the applicant company—the amount must be within the four corners of the SEC filing or subject to an agreed upon procedures letter as discussed above. For example, if a company reports a consolidated line item for all losses or gains on disposal of assets without something in the filing providing specificity as to what portion of that number accounts for long-lived assets, the Exchange will not venture outside of the SEC filing to attempt to ascertain the appropriate amount for purposes of applying the test. This is because the cumulative number could include items such as inventory write-downs, which are not subject to adjustment.

Second, as noted above, as a general rule, the Exchange will only accept the application of an adjustment in the year in which the event giving rise to the adjustment occurred. Thus, no event can give rise to an adjustment in the financial statements for any prior year. The two exceptions are (1) the use of proceeds for deleveraging and acquisitions and dispositions (for companies currently in registration for an equity offering) and (2) acquisitions and dispositions. The reason for a proposed longer scope of application for the two exceptions is detailed in the discussion above.

Third, any company for which the Exchange relies on adjustments to historical financial figures in granting financial eligibility clearance must take steps to ensure full public disclosure of how it qualified. The Exchange recognizes that, although listing applications are a matter of public record, many investors may not be aware that they are available and may believe that only the most recent publicly available SEC document is relied upon in evaluating a company. Thus, the Exchange proposes to impose two requirements on issuers. First, the Exchange proposes to codify its requirement that any adjusted financial data relied upon by the Exchange in granting financial clearance to the company must be included in the company's listing application. Second, the Exchange proposes to require these issuers to issue a press release stating that (1) pro forma financial adjustments were used to qualify the company and (2) all relevant additional information is available to the public upon request.

With respect to companies that restate financial statements due to a change from unacceptable to acceptable accounting principles and/or correction of errors, the Exchange proposes to codify its policy of reviewing the company's status at the time of the restatement. Once a company issues a restatement that affects one of the years used by the Exchange to qualify the company for listing, the Exchange will determine whether or not the company would have qualified at the time of its original financial clearance with the restated numbers. If not, the company will be subject to suspension and delisting procedures unless the company meets the original listing standards at the time of the restatement using the most recent three fiscal years of financial statements as restated. The Exchange is adopting this policy because it would be unnecessarily disruptive to delist a company for its failure to meet the standards of the Exchange at some point in the past, when the company could immediately reapply for listing and qualify for listing the very next day.

Non-U.S. Standards. The Exchange is proposing several changes to Section 103 of the Manual pertaining to non-U.S. companies (1) to carry forward relevant items from the revisions pertaining to domestic companies, and (2) to clarify the drafting of this section. Four aspects of these changes deserve mention:

- The non-U.S. public market value requirement is already $100 million worldwide; thus, no change is required.
- Replacement of NTAs with stockholders' equity as an alternate measure of size is the same except that the threshold for non-U.S. companies will remain at $100 million.
- The definition of IPOs is the same as for domestic issuers, but the representation of market value to be received in connection with a spin-off may also come from the parent company's transfer agent.
- Adjustments for foreign currency are appropriate for non-U.S. companies because their operations are inherently tied to the underlying fundamentals of their respective national economies. Thus, the Exchange does not consider their effect to be a part of the company's on-going operations if it is due to a significant economic devaluation. For purposes of this adjustment, the Exchange deems a currency devaluation of more than ten percent as against the U.S. dollar to be significant.

A domestic issuer with foreign operations would not be able to make this adjustment because the Exchange deems currency losses to be a cost of doing business in a foreign country.

Real Estate Investment Trusts. The Exchange is also proposing to codify a policy it has applied regarding the original listing criteria for real estate investment trusts (REITs). The Exchange generally lists REITs either in connection with an IPO or shortly thereafter, when the REIT does not have a three-year operating history. Specifically, the standard proposed for such newly-formed REITs, similar conceptually to that recently adopted for Funds, [9] is:

- If the REIT has at least $60 million in stockholders' equity, the Exchange will generally authorize the listing of the REIT.
- For those REITs listing in conjunction with an offering, this requirement would need to be evidenced by a written commitment from the underwriter (or, in the case of a spin-off or carve-out, from the parent company's investment banker or other financial advisor). In this regard, the Exchange notes that this is the minimum stockholders' equity requirement for listing.
- The Exchange retains the discretion to deny listing to a REIT if it determines that, based upon a comprehensive financial analysis, it is unlikely to be able to maintain its financial status.
- Any newly-formed REIT with less than $60 million in stockholders' equity will not be considered for listing.

Continued Listing Procedures. The Exchange is proposing two amendments regarding the continued listing of a company. The first is a codification of existing practice with respect to companies that qualify for listing based, at least in part, upon adjusted historical data.

Specifically, the Exchange's continued listing criteria subjects a company to delisting if it had NTAs or an aggregate market value of its common stock of less than $12 million and average net income of less than $600,000 for the past three years. In calculating average net income for a company during the initial three years following its listing, the Exchange takes into consideration those specific adjustments made to the company's historical financial data for the relevant year in the original listing application. This consideration is limited both as to the specific adjustment made during the initial clearance as well as to the year in which the adjustment was made. Otherwise, companies often would be subject to suspension and delisting immediately upon listing—an inconsistent outcome.

The second amendment proposed by the Exchange is a revision and codification of the procedures to be

[9] Securities Exchange Act Release No. 40979 (January 26, 1999), 64 FR 5332 (February 3, 1999).

instituted when a company is identified by Exchange staff as being below the continued listing criteria. The Exchange is proposing to impose specific time frames with respect to the notification, monitoring, and suspension and delisting, where appropriate, of these companies' securities. In addition, the Exchange proposes to change its current practice of requiring companies to return to original listing standards within 36 months of falling below continued listing standards. Instead, the Exchange proposes to require these companies to return to good standing by emerging from the below continued listing standards status within six quarters of being notified of this status, as described in more detail below. Specifically, the changes are as follows:

• Once the Exchange identifies a company as being below the continued listing criteria, the Exchange will notify the company by letter within 10 business days;

• The notification letter will provide the company with an opportunity to provide the Exchange with a plan to return to compliance within 18 months of receipt of the letter (the ''Plan), identify quarterly (semi-annual for non-U.S. issuers) milestones against which the company's progress would be measured by Exchange staff, and allow 45 days (90 days for non-U.S. issuers) for the submission of such a Plan;

• The company will be required to contact the Exchange within 10 business days (30 business days for non-U.S. issuers) of receipt of the letter, or be subject to suspension and delisting, to confirm receipt of the notification, discuss any possible financial data of which the Exchange may be unaware, and indicate whether or not it intends to submit a Plan;

• The Exchange's procedures for evaluating the qualification of non-U.S. companies for continued listing are substantively identical to those for domestic issuers, but makes allowances for somewhat longer time zone and communication differences and the absence of a quarterly filing requirement;

• Failure to submit a Plan within the allotted 45 days (90 days for non-U.S. issuers) will subject the company to suspension and delisting procedures;

• Upon receipt of a Plan, Exchange staff will evaluate the Plan and make a determination within 45 days of receipt of the Plan as to whether or not to accept the Plan;

• If the Exchange does not accept the Plan, the company will be subject to suspension and delisting procedures;

• If the Exchange does accept the Plan, the company will be subject to quarterly (semi-annual for non-U.S. issuers) monitoring against the Plan's milestones. If the company fails to meet the material aspects of the Plan, any of the quarterly (semi-annual for non-U.S. issuers) milestones, or the 18-month deadline, the Exchange will review the circumstances and variance, and take appropriate action that may include the initiation 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 (in any event, if the company does not meet continued listing standards at the end of the 18-month period, the Exchange promptly will initiate suspension and delisting procedures); and

• Within the aforementioned 45-day (90-day for non-U.S. issuers) period, the company must issue a press release disclosing the fact that it has fallen below the continued listing standards of the Exchange; if it fails to do so, then the Exchange will issue the requisite press release.

2. Statutory Basis

The basis under the Act for the proposed rule change is the requirement under Section 6(b)(5) [10] that an Exchange have rules that are designed 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 represents that the proposed rule change will impose no burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 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 Exchange. All submissions should refer to File No. SR–NYSE–99–13 and should be submitted by May 24, 1999.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–10984 Filed 4–30–99; 8:45 am]

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[10] 15 U.S.C. 78f(b)(5).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41333; File No. SR–PCX–99–08]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange Inc. Relating to Broker Hand Held Terminal Fees and Independent Broker Fees

April 27, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934[1] (''Act''), and Rule 19b–4 thereunder,[2] notice is hereby given that on March 31, 1999, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. PCX has designated this proposal as one establishing or changing a due, fee or other charge imposed by PCX under Section 19(b)(3)(A)(ii) of the Act,[3] which renders the proposal effective upon filing by the Commission. The Commission is publishing this notice to

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

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).