either case, NSCC would have no obligation to complete any open RVP/DVP transaction if: (1) NSCC believe it could not complete all RVP/DVP transactions in the same issue that it would be obligated to attempt to complete under this new provision; (2) there were allegations of fraud with respect to such trades or such trades are otherwise questionable; or (3) NSCC believed such trades could not be completed on a timely basis.

The proposed rule change would require NSCC to provide notice to the trustee or receiver of the member (if, in the case of an insolvent member, one has been appointed) and the relevant RVP/DVP customers or the RVP/DVP customer's depository agent or its depository agent's depository, of the RVP/DVP transactions NSCC intends to attempt to complete. This notice would alert the RVP/DVP customer that completion of any such transaction with NSCC constitutes a presumed waiver by the RVP/DVP customer of any claim arising out of such transactions against the member for whom the NSCC has declined or ceased to act, or in the case of an insolvent member, the receiver or trustee (or any successor trustee) or SIPC. This notice would typically be sent via The Depository Trust Company's electronic message dissemination system.

NSCC believes, that, by allowing it to complete open transactions in an insolvency scenario, the bankrupt estate's market exposure from the open positions would be limited, the potentially large administrative burden of liquidating the open transactions and processing claims by the RVP/DVP customers would be reduced, and the disruptive effect of the liquidation on the affected market participants would be minimized. In addition, any delay in the completion of open RVP/DVP transactions by NSCC during a liquidation, especially in the event of the insolvency of one of NSCC's largest members, would create extremely large and unnecessary short term funding obligations for NSCC.

NSCC believes the proposed rule change is consistent with Section 17A of the Act because the revisions to Rule 18 clarify the actions that NSCC is permitted to take when it declines or ceases to act for a member.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NSCC does not believe that the proposed rule change will have an impact on or impose a 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 relating to the proposed rule change have been solicited or received. NSCC will notify the Commission of any written comments received by NSCC.

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

Within thirty-five 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 ninety 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 NSCC consents, the Commission will:

(A) by order approve such proposed rule change or

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

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room in Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of NSCC. All submissions should refer to the File No. SR–NSCC–98–14 and should be submitted by July 8, 1999.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[3]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–15357 Filed 6–16–99; 8:45 am]

BILLING CODE 8010–01–M

[3] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41502; File No. SR–NYSE–99–13]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 2 and 3 Relating to Original Continued Listing Criteria

June 9, 1999.

I. Introduction

On March 31, 1999, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change relating to amendments to the NYSE's Listed Company Manual (''Manual'') regarding the original and continued listing criteria and procedures of the Exchange. On April 21, 1999, the Exchange submitted Amendment No. 1 to the proposed rule change.[3]

Notice of the proposal was published in the **Federal Register** on May 3, 1999.[4] The Commission did not receive any comment letters on the proposal. On May 27, 1999, the NYSE submitted Amendment No. 2 to the proposed rule change.[5] On June 8, 1999, the NYSE submitted Amendment No. 3 to the proposed rule change.[6] In this notice

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

[2] 17 CFR 240.19b–4.

[3] *See* Letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Richard Strasser, Assistant Director, Division of Market Regulation (''Division''), SEC, dated April 21, 1999. In Amendment No. 1, the NYSE resubmitted the entire filing to clarify several aspects of the proposal.

[4] *See* Securities Exchange Act Release No. 41324 (April 22, 1999), 64 FR 23710.

[5] *See* Letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Richard Strasser, Assistant Director, Division, SEC, dated May 27, 1999. In Amendment No. 2, the NYSE proposes to amend the international ''cash flow standard'' in the original proposal to require $100 million in aggregate earnings for the last three fiscal years instead of $25 million as is currently the case. Companies would also be required to report a minimum of $25 million in earnings for each of the two most recent years, instead of simply reporting a positive amount of earnings for the last three fiscal years.

[6] *See* Letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Richard Strasser, Assistant Director, Division, SEC, dated June 8, 1999. In Amendment No. 3, the NYSE proposes to codify the Exchange's policy regarding the use of financial data to grant eligibility clearance to an issuer that has less than three years of operating history and to clarify that real estate investment trusts and closed-end management investment companies listing with a three-year operating

and order, the Commission is seeking comment from interested persons on Amendment Nos. 2 and 3 and is approving the proposed rule change and Amendment No. 1 as well as Amendment Nos. 2 and 3 on an accelerated basis.

II. Description of the Proposal

The proposal clarifies and codifies the Exchange's criteria and procedures for evaluating a company's original and continued listing eligibility.

A. Original Listing Criteria and Procedures

The NYSE proposes to revise the size component of the Exchange's issuer financial eligibility criteria and the general eligibility listing criteria. The proposal also would codify the Exchange staff's authority to analyze the suitability of an applicant company for listing on the Exchange even if the applicant meets the Exchange's quantitative criteria. Currently, this authority is codified only in the suspension and delisting section of the Manual.

The proposal also would raise the minimum requirement for aggregate market value of publicly-held shares from $40 million to $100 million for all listings other than spin-offs and initial public offerings (''IPOs'') [7] (including carve-outs [8]). The NYSE proposes to raise the standard for spin-offs and IPOs to $60 million.

In addition, the proposal replaces the existing net tangible assets (''NTAs'') test, which is currently the additional measure of a company's size, with a stockholders' equity test ($460 million for IPOs or spin-offs and $100 million for all other domestic listings).[9] The Exchange in determining whether a company satisfies the stockholders' equity test would look to the composition of the stockholders' equity to determine the origination of such equity. The proposal also would clarify that the test is an alternate measure of size to be relied upon where circumstances warrant an alternate measure and where the applicant's public market capitalization is no more than 10 percent below the public market value listing standard. Such circumstances may include situations in which large private holdings drive down the public market capitalization or changing market forces drive down the price of the stock.

Finally, the proposal codifies the NYSE's 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 whether the company satisfies the public market value requirement of $60 million ($100 million worldwide for non-U.S. issuers).

B. Original Financial Listing Criteria and Procedures

The proposal codifies and amends the Exchange's current policies and practices with respect to the financial criteria and policies for domestic companies seeking to list with the Exchange. Currently, a company that seeks to qualify for listing on the Exchange under its domestic standards must meet one of three financial tests. Two of these 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 term is currently defined in the footnotes accompanying the rules.

According to the NYSE, in conducting its review of the financial condition of an applicant company, the Exchange historically has relied upon financial statements presented to it by the company as obtained from SEC filings. If the Exchange relied on the adjustments presented in SEC filings in granting financial clearance to the company, the company would be required to include these adjustments in its original listing application as a condition of eligibility clearance. The proposal codifies the Exchange's financial listing standards and current practices, as well as clarifies and modifies the relevant interpretations.

1. ''Pre-Tax Adjusted Earnings'' Standard

The proposal replaces the current requirement that applicants ''demonstrate * * * earning power under competitive conditions'' with a standard intended to provide 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.'' The term, ''pre-tax earnings'' incorporates the current standard of ''income before federal income taxes.'' The phrase, ''from continuing operations,'' focuses the analysis on ongoing operations and excludes any discontinued operations included in the company's historical financial statements.[10]

The clause, ''after minority interest'' removes the interest of an affiliate of the applicant company accrued to owners other than the applicant company due to its less than 10 percent ownership.[11] The phrase, ''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 results of investments that accrue to the company will be accounted for in the Exchange's analysis to determine

history must satisfy the original listing standards, set forth in paragraph 102.01 of the Manual.

[7] 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 Exchange 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 existence of U.S. publicly-traded stock rather than on prior reporting requirements. For example, while a company may 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.

[8] 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 subsidiary, 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.

[9] 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.

[10] 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. If a 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 a presentation of the adjusted data and provide an agreed upon procedures letter provided by the company's outside audit firm. 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.

[11] For example, where a subsidiary that has a 20 percent privately held (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, the Exchange would make the appropriate adjustment in its analysis to 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.

whether or not the company is eligible for listing.[12]

Finally, the proposal enumerates certain adjustments that applicants will make to the amount computed pursuant to pre-tax earnings. These adjustments would be part of the proposed standard and, as such, would 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.[13]

a. Use of Proceeds for Retiring Debt or Making Acquisitions

The Exchange currently relies on the use of proceeds anticipated from an equity offering in determining the financial eligibility of a company seeking to list its securities on the Exchange. The Exchange evaluates companies under a three-year eligibility review. 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. For deleveragings (*i.e.*, using the proceeds of an offering to pay off debt), 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 (*i.e.*, the effects ''as if'' the debt had been retired in an earlier period) 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 statements to account for the relevant preceding periods.[14]

Similarly, with regard to the 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.[15] The Exchange then reviews the historical financials of the company included in the registration statement and treats the acquisition for listing eligibility purposes as if it were consummated on the first day of the earliest fiscal year included in the acquiree's financial statements presented in the filing. The Exchange combines 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 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 the effects of any additional financing to complete the acquisition.[16]

b. Acquisitions and Dispositions

In instances other than those associated with the use of proceeds, the proposal limits the Exchange's 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.[17] If no detailed disclosure is provided for a particular acquisition or disposition, and the acquisition or disposition is only a factual, non-material, unqualified 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.

If 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 acquiror 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 NYSE proposes not to require the agreed upon procedures letter 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.

c. Merger or Acquisition Related Costs Recorded Under Pooling of Interests

The proposal excludes 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).

d. Certain Charges or Income Specifically Disclosed in the Filing

Consistent with the NYSE's past practice, the proposal excludes several items in assessing the applicant company's earnings strength or its cash

[12] 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.

[13] 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.

[14] Adjustments will not be made on any interest or principal payment(s) made on indebtedness other than that specifically being retired. The proposal requires that this adjustment be accompanied by an agreed upon procedures letter provided by the company's outside audit firm. The auditor's letter will state the procedures performed with respect to the existence of the debt and 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.

[15] 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.

[16] 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.

[17] 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. 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. 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 statements.

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.

Charges or Income Related to an Adopted Exit Plan

When a company adopts a specified exit plan, the following charges or income, if disclosed in the company's SEC filing, recorded in the company's financial statements in accordance with generally accepted accounting principles (''GAAP''), and associated with the implementation of that plan, would be excluded by the Exchange in its proposed financial analysis: (1) the costs of severance and termination benefits that are incurred as part of an exit plan; (2) costs and associated revenues and expenses associated with the elimination or reduction of product lines for which an exit plan has been adopted; (3) costs incurred to consolidate, close, or re-locate plant or office facilities associated with an exit plan; and (4) 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

The NYSE proposes to remove environmental clean-up costs incurred in the remediation of environmental problems 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.

e. Impairment Charges on Long-Lived Assets

Asset write downs that reflect the net realizable value of a long-lived asset would be excluded from historic financial results.

f. 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.

g. 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 Financial Information.'' 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).

2. ''Adjusted Cash Flow'' Standard

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 currently use an ''adjusted net income'' test for the last three fiscal years of at least $25 million in the aggregate, with all years being positive.

The proposal codifies the standard applicable to the companies meeting the above-stated $500 million/$200 million threshold by incorporating the fundamental aspects of the footnote in the current Manual into the rule. In addition, the standard will explicitly indicate that the test includes adjustments for two purposes: the use of proceeds and acquisitions, 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.

C. Policy Clarifications

The proposal also adopts 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. Second, except as noted above,[18] 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.

Third, any company for which the Exchange relies on adjustments to historical financial data 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 proposal imposes two requirements on issuers. First, it codifies the Exchange's 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 proposal requires these issuers to issue a press release stating that pro forma financial adjustments were used to qualify the company and 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 accounting principles and/or correction of errors, the proposal codifies the Exchange's 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.

D. Standards for Non-U.S. Issues

The proposal makes several changes to Section 103 of the Manual pertaining to non-U.S. companies to clarify the rules and to carry forward relevant

[18] 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.

items from the revisions pertaining to domestic companies. Specifically, the NYSE proposed to make adjustments for foreign currency for non-U.S. companies because their operations are inherently tied to the underlying fundamentals of their respective national economies. 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. The proposal also increase the aggregate amount from $25 million to $100 million for its adjusted cash flow standard and narrows to two years the requisite itemized annual financial analysis for non-U.S. companies to the two most recent fiscal years, which would be required to be reported at a minimum of $25 million. Reconciliation to U.S. GAAP of the third year back would only be required if the Exchange determines that it is necessary to demonstrate that the aggregate $100 million threshold is satisfied. In addition, for non-U.S. companies, the definition of IPOs is the same as for domestic issues, 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.

E. Real Estate Investment Trusts

The proposal also codified a policy the Exchange has applied regarding the original listing criteria for real estate investment trusts (''REITs''). The Exchange generally lists REITs either in connection with IPO or shortly thereafter, when the REIT does not have a three-day operating history, so long as the REIT has at least $60 million is stockholders' equity.[19] REITs listing with a three-year operating history must qualify under the standard equity original listing standards.[20]

F. Continued Listing Procedures

The NYSE proposes to revise its continued listing criteria by codifying existing practice with respect to companies that qualify for listing based, at least in part, upon adjusted historical data. Specifically, under the proposed continued listing criteria a company would be subject 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 adjusted was made.

The Exchange also proposes to revise and codify the procedures instituted when a company is identified by Exchange staff as being below the continued listing criteria. The proposal imposes specific time frames with respect to the notification, monitoring, and suspension and delisting, where appropriate, of these companies' securities. In addition, the proposal modifies the Exchange's current practice of requiring companies to return to original listing standards within 36 months. Instead, the proposal requires these companies to return to good standing within six quarters of being notified of this status.

III. Discussion

The Commission finds that the proposal is consistent with the Act and in particular with those provisions applicable to a national securities exchange.[21] Specifically, the Commission believes that the proposal is consistent with the requirements of Section 6(b)(5) of the Act [22] because it is 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. The Commission believes that the proposal, by codifying, expanding, and clarifying existing listing criteria and procedures, strikes a reasonable balance between the Exchange's obligation to protect investors and investor confidence in the market, and its parallel obligation to perfect the mechanism of a free and open market. The proposal establishes reasonable procedures for issuers, while giving the Exchange the ability to deny, limit, or delist an issuer that has failed to meet the substantive standards outlined in the NYSE's Manual.

Primarily, the proposal codifies the Exchange's present listing practices and procedures. The general system of Exchange review of applicant companies remains essentially unchanged. In the past, many of these procedures were not codified. As a result, it was often unclear to issuers and other market participants how the Exchange's listing procedures were applied in particular cases. As the proposal sets forth more clearly the listing criteria applicable to issuers, the Commission believes that it should enhance transparency in listing decisions, thereby promoting just and equitable principles of trade and removing impediments to a free and open market.

Specifically, the Exchange clarifies and codifies the size component of the financial eligibility and general eligibility listing criteria and establishes the NYSE's authority to investigate the suitability of an applicant company beyond the Exchange's quantitative criteria. The requisite aggregate market value of publicly-held shares would increase from $40 million to $60 million for spin-offs and IPOs (including carve-outs) and $100 million for all other listings. To demonstrate that the company will satisfy the public market value requirement of $60 million, the proposal codifies the practice of accepting a written commitment from the underwriter for IPOs. Lastly, the proposal replaces the NTA test with a stockholders' equity test, retaining the $60 million and $100 million thresholds and clarifying that the stockholders' equity test is an alternative test for measuring a company's size.

The Commission believes the proposed increases to the threshold requirements should ensure that only companies of a certain minimum size are included among those listed on the Exchange, thereby protecting investors by raising the minimum standard for listed companies. The Commission also believes that it is reasonable for the Exchange to accept a written commitment from the underwriter for IPOs, which, by definition, could not satisfy the requisite minimum aggregate market value of publicly-held shares. Additionally, the Commission believes that the proposed stockholders' equity test is simpler than the existing NTA test and could better reflect a company's value in the current economy because it accounts for intangibles and hard assets, which are frequently found on companies' balance sheets.

The NYSE also proposes to codify and revise its financial eligibility standards for original listing. First, the proposal replaces the current requirement that

[19] 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 carved-out, from the parent company's investment banker or other financial advisor). The Exchange, however, 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.

[20] *See* Amendment No. 3, *supra* note 6 (adding rule language to clarify that both REITs and closed-end funds with a 3 year operating history must meet original financial listing standards set forth in paragraph 102.01 of the Manual).

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

[22] 15 U.S.C. 78f(b)(5).

applicants ''demonstrate * * * earnings power under competitive conditions'' with a new standard, the ''pre-tax earning from continuing operations and after minority interest and equity in the earnings or losses of investees as adjusted.'' The proposal then enumerates the adjustments to be made to the amount computed under the new standard, clarifying that applicant companies may only apply those adjustments arising from events specifically identified in the company's SEC filings as to both categorization and amount. The permissible adjustments include: use of proceeds (for paying off existing debt or funding an acquisition), acquisitions and dispositions, exclusion of merger or acquisition related costs recorded under pooling of interests, exclusion of charges of income specifically disclosed in the applicant's SEC filing for certain enumerated costs, exclusion of impairment charges on long-lived assets, exclusion of gains or losses associated with sales of a subsidiary's or investee's stock, regulation S–X Article 11 adjustments, and exclusion of the cumulative effect of adoption of a New Accounting Standard. These adjustments are measured and recognized in accordance with the relevant accounting literature.

The Commission believes that the new standard more explicitly defines the analysis conducted by the Exchange in evaluating applicant companies. The Commission also believes that by codifying its current practice regarding adjustments, the Exchange increases the transparency of the financial criteria applied to companies seeking to list on the Exchange. The codification of the adjustments also ensures that the financial criteria are applied consistently and are easily auditable, thereby protecting investors and reducing the possibility of unfair discrimination between companies seeking to list on the Exchange.

Second, the proposal clarifies and codifies a second listing standard, available to companies with at least $500 million of market capitalization and $200 million of revenues in the most recent 12-month period. By incorporating the current footnote into the standard itself, the NYSE transforms the ''adjusted net income'' test into the new ''adjusted cash flow'' standard. The new standard also specifies that the adjustments included in this standard are limited to the use of proceeds and acquisitions because the remaining adjustments may not have cash-flow implications for a particular company. The Commission believes that codifying these listing standards increases the transparency of the listing criteria for companies seeking to list on the Exchange. Providing an alternative standard for listing also encourages a free and open market by giving companies that are of a sufficient size an opportunity to list that do not meet the ''pretax earnings'' standard but are otherwise qualified.

The NYSE also proposes several policy clarifications regarding the use of adjustments in the listing process. First, all adjustments must be disclosed as such in the SEC filing of the applicant company, either within the four corners of the SEC filing or subject to an agreed upon procedures letter. Second, adjustments will only be applied in the year in which the event giving rise to the adjustment occurred, except for the use of proceeds for deleveraging and acquisitions and dispositions, and acquisitions and dispositions. Third, companies whose adjusted financial data was relied on by the Exchange in granting eligibility clearance must include all adjusted financial data in the company's listing application and issue a press release to the same effect. The proposal also delineates the Exchange's procedure for reviewing a company's status at the time of a restatement of financial statements, due to a change from unacceptable to acceptable accounting principles and/or correction of efforts, including the consequences of restating financial statements.

The Commission believes that the NYSE's proposal to codify and modify the use of each of these adjustments in the evaluation of applicant companies should provide greater transparency in the listing process. This enhanced transparency should assist all market participants, including prospective companies and investors, in better understanding the significance of the NYSE's decision to list a given issuer on the Exchange.

Specifically, the Commission believes that it is appropriate for the Exchange to limit all adjustments to those disclosed as such in the issuer's filings with the Commission or as subject to an agreed upon procedures letter provided by the issuer's independent outside auditor. Any other adjustments could lack sufficient reliability to be considered by the Exchange in its listing decision. The Commission also believes that it is reasonable to limit the use of adjustments to the year in which the event giving rise to the adjustment occurred, with the two delineated exceptions, because generally, applying such adjustments to prior periods may, to some extent, distort a particular company's financial picture. Finally, the Commission believes that the NYSE's proposal to require companies that were evaluated using adjusted financial data to include all adjusted financial data in their listing applications and to issue press releases about the adjustments is appropriate because such actions should enable potential investors to better understand the companies' financial situation and the manner in which such companies were granted clearance to list on the Exchange.

The NYSE also proposes to revise several aspects of the listing criteria for non-U.S. companies which carry forward relevant items from the revisions pertaining to domestic companies, including: (1) Replacing the NTA test with the stockholder's equity test as an alternative measure of size; (2) using the same definition of IPO's as for domestic issuers, but also allowing the representation of market value required in connection with a spin-off to come from the parent company's transfer agent; and (3) allowing adjustments for foreign currency for a currency devaluation of more than ten percent. With respect to the ''adjusted cash flow'' standard, the proposal increases the aggregate amount to $100 million in operating cash flow, and narrows to two years the requisite itemized annual financial analysis for non-U.S. companies whereby each of the two most recent fiscal years would be required to be reported at a minimum of $25 million in operating cash flow. Reconciliation to U.S. GAAP of the third year back is required only if the Exchange determines that reconciliation is necessary to demonstrate that the aggregate $100 million threshold is satisfied.

The Commission believes that the proposed changes should provide a better evaluation of a non-U.S. company's financial health, and also simplify the non-U.S. company listing criteria because they parallel the benchmark applied in the pre-tax adjusted earnings standard for non-U.S. companies.[23] The Commission does not believe it is appropriate for the Exchange to impose different listing criteria on non-U.S. issuers given that they may face different financial challenges than those encountered by domestic issuers. The Commission believes that codifying these changes increases transparency for financial criteria applied to non-U.S. companies seeking to list on the Exchange.

The proposal also codifies the Exchange's policy regarding the original listing criteria for REITs. Generally, the Exchange will authorize the listing of a REIT if it has at least $60 million in

[23] *See* Securities Exchange Act Release No. 41459 (May 27, 1999), 64 FR 30088.

stockholders' equity, but will not consider those with less than $60 million in stockholders' equity. For those REITs listing in conjunction with an offering, the requirement must be evidenced by a written commitment from the underwriter. Furthermore, the Exchange may deny listing to a REIT if the Exchange determines, based upon comprehensive financial analysis, but the REIT is unlikely to maintain its financial status. REITs with greater than a three-year operating history are subject to the listing criteria described in this proposal.

The Commission recognizes that in many cases the applicant REIT is not a traditional operating entity and therefore, it may not be appropriate to apply the general earnings standards specified in the Exchange's Manual at the time of listing. Thus, the Commission believes that the Exchange's proposed minimum listing criteria of $60 million in stockholders' equity is an acceptable means for screening out those REITs that the Exchange believes are unsuitable for listing due to insufficient assets. The Commission recognizes that the stockholders' equity test is intended as a minimum standard and supports the Exchange's direction to determine that, with respect to a given REIT, notwithstanding sufficient sharholder's equity, the REIT may be unsuitable for listing.

Finally, the NYSE proposes two amendments to its continued listing criteria. First, in calculating average net income for a company during the initial three years following its listing, the Exchange will consider those specific adjustments made to the company's historical financial data for the relevant year in the original listing application. The consideration will be limited to the specific adjustment made during the initial clearance and to the year in which the adjustment was made.

Second, the proposal revises and codifies the procedures instituted when a company is identified by Exchange staff as being below the continued listing criteria by imposing specific time frames with respect to the notification, monitoring, and suspension and delisting of these companies' securities. The proposal also requires that the companies return to good standing by satisfying the continued listing standards within six quarters of being notified of this status.

The Commission believes that proposed revisions and codification of the continued listing criteria should enhance investor protection by ensuring that companies that fail to satisfy the continued listing criteria are identified, reviewed, and then subjected to specified delisting procedures. Moreover, those companies falling below the NYSE's continued listing criteria are provided with transparent, detailed procedures for addressing their status. The Commission notes that proposed changes to NYSE Rule 499 are intended to confirm that rule to the changes proposed to the continued listing criteria in NYSE Rule 802.

The Commission finds good cause for approving proposed Amendment Nos. 2 and 3 prior to the thirtieth day after the day after the date of publication of notice of filing in the **Federal Register**. Amendment No. 2 addresses the ''adjusted cash flow'' standard with respect to non-U.S. companies. The proposal increases the aggregate amount to $100 million, narrows to two years the requisite itemized annual financial analysis for non-U.S. companies whereby each of the two most recent fiscal years would be required to be reported at a minimum of $25 million, and requires reconciliation U.S. GAAP of the third year back only if the Exchange determines that reconciliation is necessary to demonstrate that the aggregate $100 million threshold is satisfied.[24] The Commission believes Amendment No. 2 is a reasonable mechanism for addressing the differences between non-U.S. and U.S. companies, helps to ensure that the financial criteria applies to non-U.S. companies seeking to list on the Exchange are fully transparent and applied consistently, and encourages a free and open market by allowing non-U.S. companies to list on the NYSE.

In Amendment No. 3, the NYSE proposes to codify the Exchange's policy regarding the use of financial data to grant eligibility clearance to an issuer that has less than three years of operating history and clarifies that REITs and Funds listing with a three-year operating history must qualify under the original listing standards for equity securities. As noticed, the proposed rule change discussed the Exchange's policy regarding the use of financial data to grant clearance to an issuer with less than three years of operating history but the proposal did not codify this policy. The Commission believes that codifying the policy is consistent with the purpose of the Act because it increases the transparency of the financial criteria applied to companies seeking to list on the exchange and ensures that the financial criteria are applied consistently across applicant companies. For these same reasons, the Commission believes it is appropriate for the Exchange to codify the applicable listing criteria for REITs and Funds listing with a three-year operating history, instead of addressing only those situations where a REIT or Fund has less than a three-year operating history. Accordingly, the Commission believes that it is consistent with Section 6 of the Act[25] to accelerate approval of Amendment Nos. 2 and 3.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment Nos. 2 and 3, including whether those amendments are consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–NYSE–99–13 and should be submitted by July 8, 1999.

V. Conclusion

It is therefore ordered, pursuant to Section 19((b)(2) of the Act,[26] that the proposed rule change (SR–NYSE–99–13), as amended, codifying and revising the NYSE's original and continued listing criteria and procedures, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[27]

Margaret H. McFarland,

Deputy Secretary.

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[24] *See*, not 11, *supra*.

[25] 15 U.S.C. 78f.

[26] 15 U.S.C. 78s(b)(2).

[27] 17 CFR 200.30–3(a)(12).