

## 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 Amex included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Amex 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

Under Section 107A of the Company Guide, the Exchange may approve for listing and trading securities which cannot be readily categorized under the listing criteria for common and preferred stocks, bonds, debentures, or warrants.<sup>3</sup> The Amex proposes to list for

trading under Section 107A of the Company Guide notes, the performance of which is linked to the Index (the "Targeted Efficient Equity Securities" or "Notes").<sup>4</sup> The Index is determined, calculated and maintained solely by S&P.<sup>5</sup> The Notes will provide for a multiplier of any positive performance of the Index during such term subject to a maximum payment amount or ceiling.

The Notes will initially conform to the listing guidelines under Section 107A<sup>6</sup> and continued listing guidelines under Sections 1001–1003<sup>7</sup> of the Company Guide. The Notes are senior non-convertible debt securities of Wachovia. The Notes will have a term of not less than one, nor more than ten years. Wachovia will issue the Notes in denominations of whole units (a "Unit"), with each Unit representing a single Note. The original public offering price will be \$10 per Unit. The Notes will entitle the owner at maturity to receive an amount based upon the percentage change of the Index. At maturity, if the value of the Index has increased over the term of the Notes, a beneficial owner will be entitled to

receive a payment on the Notes equal to three (3) times the amount of that percentage increase, not to exceed a maximum payment (the "Capped Amount") to be determined at the time of issuance of the Notes. The Notes will not have a minimum principal amount that will be repaid, and accordingly, payment on the Notes prior to or at maturity may be less than the original issue price of the Notes. Accordingly, the Notes are not "principal protected," and are fully exposed to any decline in the level of the Index.<sup>8</sup> The Notes are also not callable by the Issuer.

The payment that a holder or investor of a Note will be entitled to receive (the "Redemption Amount") depends entirely on the relation of the average of the values of the Index at the close of the market on five (5) business days shortly before maturity of the Notes (the "Final Level") and the closing value of the Index on the date the Notes are priced for initial sale to the public (the "Initial Level").

If the Final Level is greater than the Initial Level, the Redemption Amount per Unit will equal:

$$\$10 + \left[ 30 \times \left( \frac{\text{Final Level} - \text{Initial Level}}{\text{Initial Level}} \right) \right], \text{ subject to Capped Amount.}$$

If the Final Level is less than the Initial Level, the Redemption Amount per Unit will equal:

$$\$10 \times \left( \frac{\text{Final Level} - \text{Initial Level}}{\text{Initial Level}} \right)$$

The Notes are cash-settled in U.S. dollars and do not give the holder any

right to receive a portfolio security, dividend payments or any other ownership right or interest in the portfolio or index of securities comprising the Index. The Notes are designed for investors who want to participate or gain exposure to the Index, subject to a cap, and who are

willing to forego market interest payments on the Notes during such term. The Commission has previously approved the listing of options on, and securities the performance of which have been linked to or based on, the Index.<sup>9</sup>

<sup>3</sup> See Securities Exchange Act Release No. 27753 (March 1, 1990), 55 FR 8626 (March 8, 1990) (order approving File No. SR-Amex-89-29).

<sup>4</sup> Wachovia Corporation ("Wachovia") and Standard & Poor's Corporation ("S&P") have entered into a non-exclusive license agreement providing for the use of the Index by Wachovia and certain affiliates and subsidiaries in connection with certain securities including these Notes. S&P is not responsible and will not participate in the issuance and creation of the Notes.

The Exchange stated that the Index value will be disseminated at least once every fifteen seconds throughout the trading day. Telephone conversation between Jeffrey P. Burns, Associate General Counsel, Amex and Hong-Ahn Tran, Special Counsel, Division of Market Regulation ("Division"), Commission, dated May 22, 2003.

<sup>5</sup> The Index is a broad-based stock index, which provides an indication of the performance of the U.S. equity market. The Index is a capitalization-weighted index reflecting the total market value of 500 widely held component stocks relative to a particular base period. The Index is computed by dividing the total market value of the 500 stocks by an Index divisor. The Index Divisor keeps the Index comparable over time to its base period of 1941–1943 and is the reference point for all maintenance adjustments. The securities included in the Index

are listed on the Amex, New York Stock Exchange, Inc. ("NYSE") or traded through the Nasdaq Stock Market, Inc. ("Nasdaq"). The Index reflects the price of the common stocks of 500 companies without taking into account the value of the dividend paid on such stocks.

<sup>6</sup> The initial listing standards for the Notes require: (1) A minimum public distribution of one million units; (2) a minimum of 400 shareholders; (3) a market value of at least \$4 million; and (4) a term of at least one year. In addition, the listing guidelines provide that the issuer has assets in excess of \$100 million, stockholder's equity of at least \$10 million, and pre-tax income of at least \$750,000 in the last fiscal year or in two of the three prior fiscal years. In the case of an issuer which is unable to satisfy the earning criteria stated in Section 101 of the Company Guide, the Exchange will require the issuer to have the following: (1) assets in excess of \$200 million and stockholders' equity of at least \$10 million; or (2) assets in excess of \$100 million and stockholders' equity of at least \$20 million.

<sup>7</sup> The Exchange's continued listing guidelines are set forth in Sections 1001 through 1003 of Part 10 to the Exchange's Company Guide. Section 1002(b) of the Company Guide states that the Exchange will consider removing from listing any security where, in the opinion of the Exchange, it appears that the

extent of public distribution or aggregate market value has become so reduced to make further dealings on the Exchange inadvisable. With respect to continued listing guidelines for distribution of the Notes, the Exchange will rely, in part, on the guidelines for bonds in Section 1003(b)(iv). Section 1003(b)(iv)(A) provides that the Exchange will normally consider suspending dealings in, or removing from the list, a security if the aggregate market value or the principal amount of bonds publicly held is less than \$400,000.

<sup>8</sup> A negative return of the Index will reduce the redemption amount at maturity with the potential that the holder of the Note could lose his entire investment.

<sup>9</sup> See Securities Exchange Act Release Nos. 19907 (June 24, 1983), 48 FR 30814 (July 5, 1983) (approving the listing and trading of options on the Index); 31591 (December 18, 1992), 57 FR 60253 (December 18, 1992) (approving the listing and trading of Portfolio Depositary Receipts based on the Index); 27382 (October 26, 1989), 54 FR 45834 (October 31, 1989) (approving the listing and trading of Exchange Stock Portfolios based on the value of the Index); 30394 (February 21, 1992), 57 FR 7409 (March 2, 1992) (approving the listing and trading of a unit investment trust linked to the