## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–42539; File No. SR–Amex–99–39]**

## Self-Regulatory Organizations; Order Approving Proposed Rule Change by the American Stock Exchange LLC Amending Certain Listing Standards

March 17, 2000.

On September 28, 1999, the American Stock Exchange LLC (''Exchange'' or ''Amex'' submitted to the Securities and Exchange Commission (''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 amending certain of the Exchange's listing standards. The Exchange filed Amendments No. 1,[3] 2,[4] and 3 [4] to the proposed rule change on December 14, 1999, January 4, 2000, and January 19, 2000, respectively. The proposed rule change, as amended, was published for comment in the **Federal Register** on February 10, 2000.[6] The Commission received no comments on the proposal. This order approves the proposal, as amended.

### II. Description of the Proposal

Due to the merger between the National Association of Securities Dealers (''NASD'') and the Amex, the qualification functions for the Nasdaq Stock Market (''Nasdaq'') and the Amex have been centralized in the Nasdaq-Amex Listing Qualifications Department (''Listing Qualifications''). As a result of this centralization, a number of Exchange rules have been reviewed with the goal of modernizing the Exchange's initial and continued listing process, creating consistent rules and processes across all the NASD's marketplaces, and reflecting the current business practices and procedures used by Listing Qualifications. This filing addresses those goals and makes other non-substantive changes to reflect changed job titles [7] and responsibilities following the merger, and clarifies the application of certain Exchange rules.

*Application Process*

Currently, Exchange rules encourage issuers to obtain an informal opinion from Amex staff, known as the Preliminary Listing Eligibility Opinion (''PLEO''), as to whether the issuer is eligible to list before formally applying to the Exchange. Because of the time involved for the issuer to prepare for this extra review and for staff to conduct this extra review, the PLEO process causes a delay in the time it takes for a final determination to be made on an issuer's application for listing on the Exchange. This process is also inconsistent with the Nasdaq process in which an application is filed at the outset of the process. As a result, when a issuer initially pursues listing on both markets, the issuer faces a delay in its ability to make a decision as to where to list. In order to streamline the application process, the Exchange proposes to eliminate the PLEO process. Accordingly, the Exchange proposes to delete sections 202 and 203 of the Listing Standards, Policies and Requirements and modify sections 101, 130, 201 and 211 to eliminate references to the PLEO process. Under the proposed revision, issuers will only file their completed listing application with the Exchange's staff.

In addition, Exchange rules currently require a number of documents to be submitted with an original listing application. The Exchange proposes to eliminate certain requirements, including the Exchange's Listing Form 2 (Certificate of Distribution), Charter, By-Laws, Specimen Certificates, Trustee Certificates, Form for Indenture, Board Resolutions and certain contracts. Many of these documents are electronically available through an Issuer's public filings, or they are generally available to Listing Qualifications through other means (or upon request by Exchange staff from the issuer). Therefore, the Exchange proposes to remove these general requirements and instead request specific documents as necessary.[8] Specifically, the Exchange proposes to modify sections 213, 216, 218, 305, 306, and 702 to reflect these changes.

Similarly, the Exchange proposes that issuers no longer be required to obtain an opinion of counsel which, among other things, relates to the legality of the organization and existence of the issuer and the validity of the securities to be listed. These rules were originally enacted to prevent unauthorized securities from entering into the market and to protect the Exchange from legal liability, which might arise from the listing and trading of such securities. Today, however, such concerns are addressed through other means. In particular, an issuer's independent auditor reviews the issuance of securities as part of its annual audit and, generally, legal comfort is provided to market participants with respect to most securities issuances, including public offerings. Furthermore, the Exchange is largely protected from legal claims against it by its status as a self-regulatory organization. Accordingly, the Exchange proposes to delete requirements related to opinions of counsel in sections 213, 216, 218, and 306 of the Listing Standards.[9]

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

[2] 17 CFR 240.19b–4.

[3] Letter from Michael Cavalier, Associate General Counsel, Legal & Regulatory Policy, Amex, to Jack P. Drogin, Assistant Director, Division of Market Regulation (''Division''), Commission, dated December 13, 1999 (''Amendment No. 1''). Amendment No. 1 revises section 1101 of the *Amex Company Guide* to add references to forms filed with the Commission by unit investment trusts and open-end management investment companies.

[4] Letter from Michael J. Ryan, Jr. Chief of Staff, Amex, to Jack P. Drogin, Assistant Director, Division, Commission, dated December 31, 1999 (''Amendment No. 2''). As originally filed, the proposed rule change eliminated the requirement to submit with an original listing application certain corporate documents and an opinion of counsel regarding the legality of the organization, existence of the issuer, and the validity of the securities to be issued. Amendment No. 2 reinstates the requirement to submit these documents. Amendment No. 2 also makes certain technical changes to the proposed rule change.

[5] Letter from Michael J. Ryan, Jr., Chief of Staff, Amex, to Jack P. Drogin, Assistant Director, Division, Commission, dated January 18, 2000 (''Amendment No. 3''). Amendment No. 3 eliminates the requirements to file certain documents with an original listing application, including an issuer's charter and by-laws, as well as an opinion of counsel. In lieu of requiring these documents, Amendment No. 3 states that the Exchange will ask issuers specific questions concerning quorum requirements, notice of record dates to shareholders and closing of transfer books. In addition, Amendment No. 3 states that the Exchange will require issuers to (i) furnish the Exchange with copies of opinions of counsel filed in connection with recent public offerings or private placements or (ii) if no opinions of counsel exist, represent to the Exchange that they are duly and validly organized under the laws of their state of incorporation. Finally, Amendment No. 3 reinstates Section 125 of the *Amex Company Guide,* relating to remedies available to bondholders upon default.

[6] Securities Exchange Act Release No. 42378 (Feb. 2, 2000), 65 FR 6647.

[7] Changes to Part 4 of the Listing Standards reflect the elimination of the Corporate Relations Manager job function and the division of the responsibilities of the former Corporate Relations Manager among the Listing Qualifications, Stock Watch, and Issuer Service Department.

[8] In the standard comment letter that the Exchange sends issuers after Exchange staff has reviewed the issuer's listing application the Exchange will ask issuers specific questions concerning quorum requirements, notice of record dates to shareholders and closing of transfer books. Telephone call between Michael S. Emen, Vice President, Listing Qualifications, Amex, Rebekah Liu, Special Counsel, Division, Commission, and Sonia Patton, Attorney, Division, Commission, on January 27, 2000.

[9] Through its standard comment letter, the Exchange will require issuers to (i) furnish the Exchange with copies of opinions of counsel filed in connection with recent public offerings or private placements or (ii) if no opinions of counsel exist, represent to the Exchange that they are duly and validly organized under the laws of their state of incorporation. Telephone call between Michael S. Emen, Vice President, Listing Qualifications, Amex, Rebekah Liu, Special Counsel, Division, Commission, and Sonia Patton, Attorney, Division, Commission, on January 27, 2000.

The Exchange currently requires an application to be submitted by an issuer whenever a shareholder rights plan is established and the underlying rights are registered with the Commission. These rights, commonly known as ''poison pills,'' technically constitute a separate security but trade in tandem with and as part of the issuer's common stock. Upon the occurrence of a ''triggering event'' such as the announcement of a hostile takeover or the acquisition of a specified percentage of the company's outstanding common stock, the rights would be detached from the common stock and become freely tradable as separate securities. At that point, under Exchange rules, the issuer is required to file a listing application with respect to those new securities. Given the listing application requirement upon the occurrence of a triggering event and the fact that until that time the securities are not traded as separate securities, the Exchange believes the requirements of section 343 are not necessary.

*Criteria for Original Listing*

Sections 104 and 105 of the Listing Standards allow the listing of debt and warrants on the Amex, but only if the issuer is listed on the Amex or the New York Stock Exchange (''NYSE''). The exclusion of Nasdaq National market securities from this standard is no longer necessary or appropriate, given the level of the listing standards on the Nasdaq National Market in comparison to those of the Amex and the NYSE. The Exchange therefore proposes to expand the issues which may be listed on Amex to include debt and warrants of issuers listed on the Nasdaq National Market.

Sections 112, 115, and 116 of the Listing Requirements impose more stringent standards on specific types of issuers: exploration and development companies, member corporations, and companies engaged in gaming operations. These rules arose when such companies generally remained private and the listing of companies in such sectors was fairly unusual. The Exchange proposes to eliminate these sector-specific sections because the listing of securities of issuers in these sectors is now fairly common across all markets and issuers in these sectors now operate in highly regulated environments. Specifically, with respect to exploration and development companies, the Exchange notes that detailed disclosures about the issuer's stage of development and prospects are provided to potential investors in required, publicly filed reports. Accordingly, the Exchange does not believe it is appropriate to discriminate against such exploration stage companies seeking to raise capital on the Exchange. With respect to member corporations, the Exchange notes that these issuers are regulated by both the Commission and the membership organization to which the issuer belongs. Finally, with respect to companies engaged in gaming operations, the Exchange notes that these issuers operate in a highly regulated environment and are subject to substantial state and/or federal regulation. Furthermore, the Exchange notes that under its discretionary authority over all issuers, pursuant to section 101, it has authority to deny listing to issuers based on sector-specific issues in appropriate situations. Accordingly, the Exchange does not believe that the specific rules relating to issuers in these sectors are necessary or appropriate.

The Exchange also proposes to clarify that the alternate listing guidelines contained in section 101 of the Listing Standards are not limited to issuers in certain sectors. The alternate guidelines were first adopted in 1977 and then modified in 1986 to allow a broader range of companies to qualify. The guidelines referenced as examples companies that were unable to satisfy the basic criteria due to significant research and development or other similar business development costs. The Exchange proposes changes to section 101 to clarify that the numerical aspects of the alternate guidelines apply to all issuers, regardless of industry. This change would be consistent with the approach used on Nasdaq, the Nasdaq SmallCap Market, and the NYSE, where alternative listing requirements are available to all issuers that meet the quantitative requirements.

*Fees*

Section 144 of the Listing Standards currently imposes a $250 non-refundable service charge that is subtracted from any refund otherwise due an issuer that is not approved for listing or that withdraws after completing the application process. Given the cost incurred by the Exchange in reviewing an application, the Exchange proposes to raise the non-refundable portion of the initial inclusion fee from $250 to $1,000 and to require the payment of this amount in advance of processing the application, in order to timely recoup such costs, especially in situations where these costs are incurred by the Exchange and the application is then withdrawn. The Exchange notes that this proposed change will not affect the listing fees paid by issuers who ultimately list on the Exchange and that this practice is consistent with that followed by Nasdaq. In addition, the Exchange notes that if an issuer applies for listing on both the Exchange and on Nasdaq, only a single $1,000 non-refundable fee would be collected for review of both applications.

The Exchange also proposes to modify the treatment of treasury shares for fee purposes Under existing section 141, Amex listing fees are based on all shares outstanding, including treasury shares. The Exchange proposes to modify section 141 to exclude treasury shares when calculating shares outstanding for fee purposes [10] and to clarify that annual fees billed based on shares outstanding information refers to information available on Exchange records as of December 31, and not shares outstanding information sent to the Exchange by issuers in February. This proposed rule change will result in a decrease in fees for issuers with treasury shares and will not affect other issuers.

Finally, as discussed above, because the Exchange proposes to eliminate section 343, requiring the submission of an application upon the creation of a shareholder rights plan, the Exchange also proposes to modify section 140, to eliminate the $1,000 fee associated with the shareholder rights plan application.

*Schedule for Dividends*

The Exchange proposes to eliminate several rules that require additional time between the declaration and dividend date for dividends of issuers that do not have transfer facilities in the New York City area. Given the current state of communication networks and electronic interaction between issuers, transfer agents and investors, these additional time periods are no longer necessary. Accordingly, the Exchange proposes to modify sections 502, 512, and 521 and to eliminate section 520 to implement this proposed change.

*Transfer Facilities*

Likewise, the Exchange proposes to remove a variety of rules concerning the qualification of Transfer Agents, Registrars, and Bond Trustees presently contained in sections 801–811. The Commission regulates the transfer agent industry and, since 1976, has imposed a series of rules over the industry [11] that make many of the Exchange's rules unnecessary. Other Exchange rules relating to transfer agents (as well as

[10] This is consistent with the approach taken on the Nasdaq, resulting in identical application across all of the NASD's marketplaces.

[11] *See* Exchange Act Rules 17Ad–1 through 17Ad–21T, 17 CFR 240.17Ad–1 through 17 CFR 240.17AD–21T.

Agents for Payment) are inappropriate, as they limit the ability of agents with physical locations outside of New York to perform these functions. The Exchange also proposes to eliminate the requirements relating to Trustees for Bond Issues in section 811. The Exchange has never experienced a problem with respect to the qualification of a Bond Trustee and believes that these matters are better left to the individual issuers and applicable state law. Accordingly, the Exchange proposes to delete section 801–811 and to make conforming change to other sections that refer to those sections.

*Certificate Requirements*

The Exchange also proposes to remove requirements relating to the form of securities and lost security holders. The rules relating to the form of securities are antiquated and may impede the use of innovations in this area, such as Depository Trust Corporation holdings and book entry methods. Furthermore, the Exchange notes that there are no comparable rules on Nasdaq. Accordingly, the Exchange proposed to delete existing sections 820 through 830, inclusive, and section 841 of the Listing Standards. Likewise, the Exchange rules governing the replacement of lost certificates in section 840 are no longer necessary in light of current practices followed by issuers and transfer agents.

*Treasury Shares*

Existing Exchange rules require an issuer to report changes in the number of treasury shares. Given the changes proposes to the fee calculation for issuers, resulting in the exclusion of treasury shares from the fee base, the Exchange no longer needs this information. Accordingly, the Exchange proposes to eliminate section 901 of the Listing Standards. Furthermore, section 903, on repurchases of listed company securities, is unnecessary because it does not impose any Exchange requirements, but merely refers issuers to federal securities laws. Finally, the Exchange notes that section 902 allows an issuer to redeem securities only in pro rata fashion or by lot. The Exchange notes that issuers are governed by state law requirements in the redemption of securities and that as a practical matter, one of these methods is invariably applied. Therefore, the Exchange believes that section 902 is unnecessary and proposes its deletion and conforming amendments to sections 103(d), 104, and 105(b).

*Other Changes to the Exchange's Listing Requirements*

The Exchange proposes certain changes to the listing requirements for issuers listed on the Amex. The Exchange proposes to change the definition of ''public distribution'' and ''public shareholders'' as defined in section 102. Currently, in determining the number of shares in the public, Exchange rules exclude concentrated holdings of 5% or greater. The comparable rules on Nasdaq, as well as the NYSE, only exclude holdings of 10% or greater. The Exchange believes that it is appropriate to exclude holdings of between 5% and 10% from the definition of public distribution and accordingly, proposes to modify section 102.

Next, the Exchange proposes to modify section 120, relating to conflicts of interest. The existing Exchange rule states that the Exchange will consider conflicts situations in connection with the original listing of an issuer. The Exchange believes that a broader, ongoing review of related party transactions is appropriate and that the issuer's Audit Committee (or a comparable body) is an appropriate body for conducting such a review. Furthermore, the Exchange notes that under the proposed change, as in all cases, it may review a transaction using the Exchange's general discretionary authority if a transaction involved a conflict that raised public interest concerns. Accordingly, the Exchange proposes to adopt this revised listing requirement to better protect investors.[12]

The Exchange also proposes to amend its rules relating to shareholder approval contained in section 713 to clarify that shareholder approval is required prior to issuance of a security that has the *potential* to result in the issuance of 20% of the pre-transaction common shares outstanding for less than the greater of book or market value of the stock. While the present language of the rule does not include the word potential, it is fairly implied and Exchange staff has consistently applied the rule to require approval in cases where an issuance may potentially exceed the stated threshold. Accordingly, the Exchange proposes to modify the existing rule to clarify that an issuance is not permissible without shareholder approval when there is the potential to issue more than 20% of the pre-transaction common shares outstanding for less than the greater of book or market value of the stock.

*Emerging Company Marketplace*

In May 1995, the Exchange determined to discontinue the listing of new companies on the Emerging Company Marketplace and subsequently received Commission approval.[13] Accordingly, the Exchange proposes to delete from the Supplement to the *Amex Company Guide* the criteria for new listing on the Emerging Company Marketplace. Furthermore, the Exchange proposes to delete from the Supplement the continued listing criteria with respect to all issues other than common stock because no existing issuers rely on these provisions and no new issuers can be listed that would rely on these provisions. This conforming change is consistent with the Commission's order approving the elimination of the Emerging Company Marketplace.

**III. Discussion**

The Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act[14] and the rules and regulations thereunder applicable to a national securities exchange, in that it is designed to facilitate securities transactions and to remove impediments to and perfect the mechanism of a free and open market.[15] The Commission believes that the Exchange has adequately addressed the concerns that arise from eliminating the requirement to file certain corporate documents and an opinion of counsel with an original listing application. In both instances, the Exchange will obtain the most pertinent information that was provided in the required documents directly from issuers. For example, the Exchange will obtain information regarding the issuer's quorum requirements, notice of record dates to shareholders, and closing of transfer books— previously available in the corporate documents filed by the issuer—via the Exchange's standard comment letter sent to issuers. With respect to the opinion of counsel previously required, the Exchange has similarly proposed procedures for

[12] The Exchange notes that this proposed change is consistent with the rules relating to conflicts of interest that apply to Nasdaq issuers and NYSE issuers. *See* NASD Rules 4310(c)(25)(G) and 4460(h) and NYSE Listed Company Manual Section 307.00.

[13] *See* Securities Exchange Act Release No. 36079 (Aug. 9, 1995), 60 FR 42926 (Aug. 17, 1995) (SR–Amex–95–23). Companies that were listed at the time the Emerging Company Marketplace was discontinued were permitted to continue their listing, subject to all the rules applicable to issuers on that Emerging Company Marketplace.

[14] 15 U.S.C. 78f(b)(5).

[15] In approving this rule change, the Commission has considered the proposal's impact on efficiency, competition, and capital formation, consistent with section 3 of the Act. 15 U.S.C. 78c(f).

eliciting the pertinent information regarding the legal status of the issuer and the validity of the securities to be listed. By instituting these alternative procedures, the Commission believes that eliminating the filing of certain corporate documents and an opinion of counsel is reasonable and will allow issuers to list their securities on the Exchange more quickly and less expensively. Additionally, the Commission notes that electronic access to many of the corporate documents previously required provides an additional safeguard and source of information for the Exchange and the public.

The Commission also believes that the proposed rule change will facilitate securities transactions and benefit investors by modernizing, simplifying, and conforming the Exchange's listing procedures to current business practices. For example, the Commission believes that the Exchange rules relating to the form of securities and lost security holders, limitations on transfer agents located outside of New York, and sector-specific listing requirements are no longer necessary, given technological advances and general developments in the capital markets. Similarly, eliminating the PLEO process simplifies the listing process significantly for issuers. Finally, changes to the rules relating to shareholder approval for the issuance of a security in certain circumstances (*e.g.,*Exchange Rule 713), conforms the Exchange's listing standards to common business practice.

Lastly, the Commission believes that the proposed rule change will facilitate securities transactions by creating consistent rules and processes governing the listing of securities on both Nasdaq and Amex. Because the listing qualifications of both Nasdaq and Amex are now handled by the Nasdaq-Amex Listing Qualifications Department, the Commission believes that consistent rules and practices between both marketplaces will enable issuers to list securities on the Exchange much more quickly and will enable the Exchange to more efficiently review and process listing applications.

## IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,[16] that the proposed rule change (SR-Amex–99–39), as amended, is approved.

[16] 15 U.S.C. 78s(b)(2)

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[17]

**Margaret H. McFarland,**

*Deputy Secretary.*

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[17] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–42538; File No. SR–MSRB–00–01]**

## Self-Regulatory Organizations; Order Approving a Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Supervision of Correspondence With the Public

March 16, 2000.

### I. Introduction

On January 7, 2000, the Municipal Securities Rulemaking Board (''Board'' or ''MSRB'') submitted to the Securities and exchange Commission (''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 amending MSRB Rules G–8, G–9, and G–27. The proposed rule change was published for comment in the **Federal Register** on February 10, 2000.[3] The Commission received no comments on the proposal. This order approves the proposal.

### II. Description of the Proposal

The Board has filed proposed amendments to MSRB Rules G–8, on books and records, G–9, on record retention, and G–27, on supervision. The proposed rule change will revise the Board's supervision and record retention rules to provide dealers with flexibility in developing reasonable procedures for the review of correspondence with the public. The amendments also accommodate the growing use of correspondence sent and received in electronic format while still providing for effective supervision. The Board has also filed with the Commission a draft notice that will provide guidance to dealers on how to implement these rule changes. The proposed rule change and accompanying notice are modeled after and designed to conform to the rules and guidance of the National Association of Securities Dealers (''NASD'').[4]

The Board has determined to adopt rules changes substantially similar to those of the NASD. The Board believes that conforming its rule language to the language in the NASD rules will help ensure a coordinated regulatory approach to the supervision of correspondence. In addition, in connection with Commission approval of the proposed rule change, the Board will issue a notice to provide guidance to dealers on implementing the proposed rule change. This guidance has been modeled after NASD Notices to Members 98–11 and 99–03 and is described below.

*Supervision of Municipal Securities Representatives*

The proposed amendments to MSRB Rule G–27(d), provide, among other things, that a dealer must establish procedures for the review by a designated principal of each municipal securities representative's incoming and outgoing written (*i.e.,* non-electronic) and electronic correspondence with the public relating to the municipal securities activities of such dealer. The procedures must be designed to provide reasonable supervision of each municipal securities representative and must be described in the dealer's written supervisory procedures. Implementation and execution of these procedures must be clearly evidenced, and the evidence must be maintained and be made available upon request to a registered securities association or the appropriate regulatory agency as defined in Section 3(a)(34) [5] of the Act.

*Procedures for Review of Correspondence*

Currently, MSRB Rule G–27(c)(vii)(C) requires each dealer to establish procedures for the review and written approval by a designated principal of all correspondence pertaining to the solicitation or execution of transactions in municipal securities. Under proposed Rule G–27(d)(ii), a review of each item of correspondence will no longer be required. Dealers will be given flexibility to develop procedures for the review of correspondence relating to the dealer's municipal securities activities—both incoming and outgoing, written or electronic—tailored to the nature and size of the dealer's business and customers.

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

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 42385 (Feb. 3, 2000), 65 FR 6669.

[4] *See* Securities Exchange Act Release No. 39510 (Dec. 31, 1997), 63 FR 1131 (Jan. 8, 1998); NASD Rule 3010; and NASD Notices to Members 98–11 and 99–03.

[5] 15 U.S.C. 78c(a)(34).