

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59050; File No. SR-Amex-2008-70)

December 3, 2008

Self-Regulatory Organizations; American Stock Exchange LLC; Order Approving Proposed Rule Change as Modified by Amendment No. 1 thereto, to Revise its Initial Listing Process to Eliminate the Current Appeal Process for Initial Listing Decisions, Add a New Confidential Pre-application Eligibility Review Process, and Upgrade its Listing Requirements by Eliminating the Alternative Listing Standards

I. Introduction

On September 4, 2008, the American Stock Exchange LLC (“Amex,” or the “Exchange”) filed with 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 to amend the procedures for initial listing of securities on Amex. On September 17, 2008, Amex filed Amendment No. 1 to the proposed rule change. The proposed rule change was published for comment in the Federal Register on September 24, 2008.³ Initially one comment was received opposing the proposed rule change.⁴ NYSE Alternext US LLC⁵ filed a response on October 22, 2008.⁶ Subsequently, an additional comment letter was

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 58570 (September 17, 2008), 73 FR 55185 (“Notice”).

⁴ See letter from Brendan E. Cryan, Managing Member Brendan E. Cyran & Company, LLC, and Jonathan Q. Frey, Chief Operating Officer of J. Streicher & Co. L.L.C., dated October 10, 2008 (“Specialist Letter 1”).

⁵ NYSE Alternext US LLC (“Alternext”) is the successor to the Amex, after being acquired by the New York Stock Exchange LLC (“NYSE”).

⁶ See letter from Janet Kissane, Corporate Secretary, NYSE Alternext US LLC, dated October 22, 2008 (“Alternext Response Letter”).

received in response to Alternext's letter.⁷ This order approves the proposed rule change, as modified by Amendment No. 1 thereto.

II. Description of the Proposal

Sections 101(e) and 1203(c) of the Amex Company Guide currently provide that the securities of certain issuers which do not satisfy any of the Exchange's regular initial listing standards may nonetheless be eligible for initial listing on the Exchange pursuant to the Exchange's appeal procedures, which include authorization of approval of the listing by a Listing Qualifications Panel of the Exchange's Committee on Securities, if (a) the issuer satisfies one of two minimum numerical alternative listing standards, and (b) the Listing Qualifications Panel makes an affirmative finding that there are mitigating factors that warrant listing pursuant to these alternative listing standards.⁸ The Exchange proposes to eliminate the two alternative listing standards.⁹ In addition, to align its initial listing process with the process in place at the NYSE, the Exchange proposes to amend Sections 101 and 1201-1206 of the Amex Company Guide to eliminate the current appeal process for initial listing decisions by the Exchange. The Exchange believes that requiring listing applicants to meet the requirements of the Exchange's regular initial listing standards will strengthen and enhance its listing standards. Further, the Exchange's experience with its existing initial listing appeal process is that it has almost never been utilized, and never successfully, to appeal a staff determination on the basis that such

⁷ See letter from Jonathan Q. Frey, Chief Operating Officer of J. Streicher & Co. L.L.C., dated October 30, 2008 ("Specialist Letter 2").

⁸ The issuer is also required to make an announcement through the news media that it has been approved for listing pursuant to the alternative listing standards. See Section 1203(c)(iii) of the Amex Company Guide.

⁹ The Exchange notes that a relatively small number of companies are listed on the Exchange each year under the two alternative listing standards that are being eliminated under the proposed rule change. See infra note 18.

determination was erroneous. According to Amex, the few appeals made have been by issuers seeking listing under the two aforementioned alternative listing standards (which can only be achieved through the appeal processes).

The Exchange also proposes to add a new mandatory confidential pre-application eligibility review process for companies considering an initial listing on the Exchange. Pursuant to this process, company officials seeking a listing on the Exchange would be required to undertake preliminary confidential discussions with the Exchange, prior to submitting a formal listing application, to determine whether its securities are eligible for listing approval. Only after a company has cleared the confidential pre-application eligibility review and has been authorized by the Exchange to proceed may it file an original listing application and complete the other formal steps in the original listing process pursuant to Section 202 of the Amex Company Guide.¹⁰ The information needed for the purpose of conducting a confidential pre-application eligibility review is set forth in current Sections 210 - 222 of the Amex Company Guide.¹¹ There will be no charge to the company in connection with the confidential pre-application eligibility review.

The Exchange anticipates that the proposed new confidential pre-application eligibility review process will enable it to provide an issuer with guidance and clarification on whether or not it is eligible for listing on a more expeditious basis. The Exchange believes that the new confidential pre-application eligibility review process will provide a fair procedure, consistent

¹⁰ The confidential pre-application eligibility review process would be comparable to the process in place at the NYSE as described in Sections 101, 104 and 701 of the NYSE Listed Company Manual.

¹¹ Sections 210-220 of the Amex Company Guide currently contain requirements for original listing applications. With the adoption of the pre-application eligibility review, these same criteria will be required for that process as well.

with Section 6(b)(7) of the Act,¹² for all issuers seeking listing, including those that receive an adverse determination. Specifically, consistent with the Exchange's current review process, initial listing eligibility determinations must be made in accordance with the criteria specified in the Exchange's listing standards, following a rigorous staff analysis and managerial oversight. The Exchange asserts that this structured review process, based on transparent standards, mitigates against erroneous determinations.

The Exchange represents that it has considered how to transition the proposed rule change and proposes the following treatment for issuers that have applications currently in process for an initial listing on the Exchange. Any initial listing applications that are already filed and in process with the Exchange as of the date of effectiveness of this proposed rule change ("Legacy Applications") will be treated as if they were still governed by the initial listing procedures in the Amex Company Guide as in effect immediately prior to such date of effectiveness, which effective date will be the date of approval of the rule change by the Commission. Consequently, companies with Legacy Applications would have the right to appeal the initial listing decision and to be evaluated for listing under the alternative initial listing standards that are being eliminated by this filing. To this end, the Exchange proposes the addition of a temporary Section 1212T to the Amex Company Guide. Temporary Section 1212T will contain the current initial listing provisions of the Amex Company Guide that reference the alternative listing standards and other provisions of Part 12 that are applicable to such alternative standards, which are otherwise being proposed for deletion from the Amex Company Guide. The temporary provisions of Rule 1212T will apply solely to the Legacy Applications and will otherwise be of no force or effect.

¹² 15 U.S.C. 78f(b)(7).

In addition to the changes discussed above, the Exchange is also proposing three other minor changes of a “housekeeping” nature to the text of the Amex Company Guide. Section 206, containing an outdated and non-substantive reference to listing day, would be eliminated. An outdated reference in Section 1202 to the Listing Investigations Department (which no longer exists) would be deleted under the proposed rule change. Finally, language in Section 1201(d) listing a number of non-quantitative factors that the Exchange will consider in evaluating an initial listing application would be eliminated under the proposal, because those factors (and certain others) are already set forth in Section 101.

Amex filed the proposed rule change to implement a NYSE Euronext business plan for the Amex after the consummation of the transactions contemplated by the merger agreement dated January 17, 2008 among the Exchange, the Amex Membership Corporation, NYSE Euronext and certain other entities, whereby a successor to the Exchange will become an indirect, wholly-owned subsidiary of NYSE Euronext (the “Acquisition”). The Acquisition was completed on October 1, 2008, so pursuant to the implementation schedule set forth by the Exchange, the proposal will take effect upon Commission approval.¹³

III. Summary of Comments

Specialist Letter 1 objects to the Exchange’s elimination of the alternative listing standards and states that, at a minimum, Amex should be required to more fully explain its concerns with the alternative standards so that the commenters and the public can adequately analyze the proposal.¹⁴ In this regard, Specialist Letter 1 raised several issues or requests for

¹³ See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 58995 (October 1, 2008); see Notice, supra 3.

¹⁴ See Specialist Letter 1, supra note 4.

additional clarification.¹⁵ First, Specialist Letter 1 is skeptical of the Exchange's proposition that the elimination of the two alternative listing standards will strengthen and enhance the initial listing standards.¹⁶ The Exchange responded that this is adequately addressed in the Notice and that the Exchange made a business determination to eliminate the alternative listing standards which impose a less stringent standard than the regular initial listing standards. The Exchange noted that elimination of the alternative listing standards will require that all companies seeking listing on the Exchange to satisfy the more stringent regular listing standards, which in the Exchange's view will strengthen and enhance its initial listing standards.¹⁷ The Exchange further noted that in each full year since 2002, the number of companies approved for listing under the alternative listing standards was minimal and that due to these small numbers, the process was disproportionately cumbersome and resource intensive.¹⁸ Therefore, the Exchange concludes elimination of the alternative listing standards will have a relatively minimal impact on listings on the Exchange or Exchange equity specialists.

Second, Specialist Letter 1 argues that the Exchange fails to offer any analysis or facts to support its proposal. Such analysis, Specialist Letter 1 states, will help determine whether alternatives that are less detrimental may exist. In response, the Exchange states that it is not required to demonstrate that companies listed under the alternate standards have performed worse than other listed companies, and that a decision to reasonably increase its listing standards is a business decision within its purview.

¹⁵ See Specialist Letter 1, supra note 4.

¹⁶ See Specialist Letter 1, supra note 4, at 2.

¹⁷ See Response Letter, supra note 5, at 1-2.

¹⁸ Since 2003, only 16 companies were approved under the alternative standards in comparison with 455 under the regular standards.

Third, Specialist Letter 1 raises the concern that the proposed rule change will have a negative impact on the companies that will not otherwise qualify for listing on the Exchange if the alternative initial listing standards are eliminated.¹⁹ The Exchange believes that adequate trading venues, such as the Over the Counter (“OTC”) Bulletin Board exist for those companies that cannot meet the Exchange’s regular initial listing standards.²⁰ The Exchange further notes that as these companies grow in other markets, they may later become eligible for listing under the Exchange’s regular initial listing standards.

Finally, Specialist Letter 1 questions whether NYSE Euronext supports the proposed rule change.²¹ The Exchange noted in the Notice that the proposed changes to the initial listing process were part of its strategic business planning in anticipation of its acquisition by NYSE Euronext and was aimed at more closely aligning its listing process with the NYSE.²² The Response Letter confirms that NYSE supports the Exchange’s proposal.²³

Specialist Letter 2²⁴ argues, among other things, that it is not consistent with Section 6 of the Act for the Exchange to simply justify its proposal as a business decision entirely within its purview. Specialist Letter 2 also states that the Exchange failed to answer questions on whether companies listed under the alternative standards performed poorly as compared to other listed companies, and that this information should be a matter of public record. The commenter argues

¹⁹ See Specialist Letter 1, supra note 4, at 2. In particular, the commenters note that elimination of the standards will result in more companies trading in less regulated, less liquid, and more expensive markets and will impact capital formation for such companies.

²⁰ See Response Letter, supra note 6, at 2.

²¹ See Specialist Letter 1, supra note 4, at 2-3.

²² See Response Letter, supra note 6, at 3.

²³ Id.

²⁴ Specialist Letter 2 was submitted by one of the two commenters who submitted Specialist Letter 1. See supra note 7.

that it is difficult to understand why the Exchange would want to reduce its ability to list companies at a time it is losing its top tier companies to NYSE which could raise questions about the “future health and well being of the Exchange.”²⁵ The commenter also reiterates its position that relegating these companies to alternate markets does not seem to be in the public interest. Finally, the commenter notes, among other things, that the Exchange still has not been able to show any harm from listing companies under the alternative standards, and that the Exchange should be required to provide facts and analysis to support a finding that elimination of the alternative standards are in the public interest.²⁶

IV. Discussion and Commission Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange²⁷ and, in particular, the requirements of Section 6 of the Act.²⁸ Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²⁹ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and

²⁵ See Specialist Letter 2, supra note 7 at 2.

²⁶ Id. at 3.

²⁷ In approving this proposed rule change the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

²⁸ 15 U.S.C. 78f.

²⁹ 15 U.S.C. 78f(b)(5).

a national market system, and, in general, to protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The Exchange proposes to eliminate the appeal procedures for initial listing decisions. The Exchange further proposes to eliminate the alternative listing standards on which almost all of such initial listing appeals are based. As a result of the proposed rule change, all companies that list on the Exchange must meet the requirements of the Exchange's regular initial listing standards which are higher than the alternative initial listing standards.³⁰

The Commission has carefully considered both of the comments. The commenters argue that Amex has not justified elimination of the alternative listing standards and should be required to provide facts and analysis to support a finding that the proposal is in the public interest. They further note that to do otherwise would accede to the Exchange's view that they are not required to show that companies listed under the alternative standards have performed more poorly than other companies and that the decision to eliminate the alternative standards is totally a business decision that is within its purview. The commenters believe this analysis ignores the requirements of Section 6 of the Act that requires proposals of the Exchange to only be approved if they are in the public interest.

After carefully considering these comments, the Commission believes that the proposal as to the elimination of the alternative listing standards are reasonable and consistent with the Act, and furthers investor protection and the public interest. In making this finding, the Commission notes at the outset that the development and enforcement of adequate standards governing the initial and continued listing of securities on an exchange is an activity of critical

³⁰ See Amex Company Guide Sections 210-222 for current initial listing standards. See also Response Letter, supra note 6 at Exhibit A which contains a comparison of regular initial listing standards versus alternative listing standards.

importance to financial markets and the investing public. Listing standards serve as a means for an exchange to screen issuers and to provide listed status only to bona fide companies that have, or in the case of an initial public offering will have, sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets. Adequate standards are especially important given the expectations of investors regarding exchange trading and the imprimatur of listing on a particular market.

Based on the above analysis, the Commission would find it difficult to justify denying an exchange the ability to eliminate lower listing standards under the Act, assuming the elimination of such standards are done on a fair and equitable basis, does not unfairly discriminate between issuers as required under Section 6(b)(5) of the Act, and there remain sufficient listing and regulatory requirements to ensure adequate depth and liquidity for listed companies, and the protection of investors and the public interest. Where all of these factors exist, as the Commission finds in the Amex's proposal, the Commission believes that it is within the Exchange's business judgment to determine it no longer wants to qualify for listing these type of smaller companies under its rules.³¹ The Commission emphasizes that its approval of the Amex's proposal is not being based solely on the business judgment of the Exchange. While the Exchange's determination to eliminate the alternative initial listing standards may indeed be motivated by its business judgment, the Commission nevertheless believes that fact does not

³¹ The Commission notes that under the Exchange's rules, the approval of an application for listing of securities is a matter solely within the discretion of the Exchange. Further, the Commission notes that the rule permits the Exchange to deny listing even if the company meets the listing standards. See Amex Company Guide Section 101.

preclude us from finding, as we do for the reasons discussed herein, that the proposal is consistent with the requirements of the Act and Section 6(b)(5) in particular.³²

In making this finding the Commission notes that Amex has provided for Legacy Applications so that any issuer that was currently being considered under the Amex's initial listing standards up to the date of approval of this rule filing could still avail itself of the alternative listing standards if it so qualified. This helps to ensure that issuers currently in the process of applying for initial listing on Amex would not suddenly find the alternative standards unavailable due to the approval of this rule proposal. Further, companies that initially listed on the Exchange under the alternative listing standards will remain listed and not be affected by the proposal, which is on a going forward basis. In this regard, Amex's regular initial listing and continued listing standards remain the same for all listed companies.

The Commission notes that in terms of potential harm to issuers who no longer will be able to avail themselves of the Amex alternative initial listing standards, alternative trading venues exist for these companies as noted on in the Exchange's Response Letter.³³ As discussed above, existing listed companies and Legacy Applicants will not be adversely affected in any way by the Exchange's proposal. The Commission does not believe the Exchange is required to maintain lower listing standards to accommodate the potential for listings in the future,

³² See also Securities Exchange Act Release No. 56606 (October 3, 2007), 72 FR 57982 (October 11, 2007) (approving proposed rule change by NYSE Arca, Inc. to amend initial listing standards that would have the effect of excluding from qualification some companies that previously qualified for initial listing)

³³ While the commenters argue that such alternative markets will provide less protection for shareholders, the Commission need not make a qualitative judgment about such markets to address this concern. Rather, the Commission believes that it is sufficient to determine that given the importance of listing standards and the expectations of investors in terms of the types of companies listed on a national securities exchange as discussed above, it will further the public interest by eliminating the Exchange's lower listing standards and requiring all listed companies to meet the existing higher regular initial listing standards.

especially when alternative markets exist and all companies have an equal opportunity to apply under regular initial listing standards.

Finally, the Commission recognizes that the commenters, as specialists on the Exchange, may potentially be losing the ability to make a market in securities of companies that could have qualified for listing under the alternative standards. However, as provided in the Amex Response Letter, the majority of companies are listed on the Exchange under the regular initial listing standards, while listing under the alternative standards has only represented a small percentage of the overall listings on the Amex. For example, in 2007 of 109 new listings, 2 were under the alternative standards. Further, those companies that no longer qualify for initial listing could, as noted by Amex, apply in the future for an Amex listing after developing a trading market in an alternative market place. The Act does not dictate that Amex continue to list companies that cannot qualify under the regular listing standards because of the potential loss of business. Indeed, to require Amex to retain its alternative listing standards for that reason would, in itself, be a business decision. For all the reasons discussed above, the Commission believes that the proposal to eliminate the alternative initial listing standards is reasonable and should continue to provide only for the listing of securities with a sufficient investor base to maintain fair and orderly markets and adequately protect investors and the public interest.

The Commission also believes that the establishment of a mandatory confidential pre-application review is reasonable and consistent with the Act.³⁴ The Commission notes that the new confidential pre-application eligibility review criteria are set forth in the Amex Company Guide.³⁵ The pre-application review process will enable the Exchange to obtain information

³⁴ The NYSE currently has a similar process in place; see Sections 101, 104 and 701 of the NYSE Listed Company Manual.

³⁵ See proposed Section 201 of the Amex Company Guide.

from companies seeking a listing and provide the issuer with guidance and clarification on whether or not it is eligible for listing. The proposal should therefore make the listing process more efficient for both the Exchange and potential listed companies. Accordingly, the Commission believes that the changes adequately protect investors and the public interest.

Finally, the Commission notes that the elimination of the outdated and redundant provisions is consistent with the Act and should make the Company Manual easier and clearer to use.

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and in particular Section 6 of the Act and the rules and regulations thereunder.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change, as amended (File No. SR-Amex-2008-70) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁶

Florence E. Harmon
Acting Secretary

³⁶ 17 CFR 200.30-3(a)(12).