

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50263; File No. SR-Amex-2004-60)

August 25, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of
Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange
LLC Regarding Listed Company Board of Director Independence Standards

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 2, 2004, the American Stock Exchange LLC (the “Amex” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by Amex. On August 23, 2004, the Amex submitted Amendment No. 1 to the proposed rule change.³ Amex has filed the proposed rule change as a “non-controversial” rule change under Rule 19b-4(f)(6) under the Act,⁴ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Claudia Crowley, Vice President and Deputy Chief Regulatory Officer, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation (“Division”), Commission, dated August 20, 2004 (“Amendment No. 1”). Amendment No. 1 made technical and clarifying corrections to the original submission and replaced the original filing in its entirety. The changes made by Amendment No. 1 are incorporated in this notice.

⁴ 17 CFR 240.19b-4(f)(6).

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

The Amex proposes to revise Section 121 of the Amex Company Guide (“Company Guide”) to specify that payments received by a director of a listed issuer from the issuer in connection with a banking or brokerage transaction entered into in the ordinary course of business on non-preferential terms will not be included in the types of payments that (if the applicable threshold is reached) would preclude the director’s independence. The Amex also proposes to adopt new Commentary .06 to Section 121 of the Company Guide, to specify that such payments must be disclosed to the listed company’s board of directors.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.⁵

* * * * *

Sec. 121. INDEPENDENT DIRECTORS AND AUDIT COMMITTEE

A. No change.

(a) No change.

(b) a director who accepts or has an immediate family member who accepts any payments from the company or any parent or subsidiary of the company in excess of \$60,000 during the current or any of the past three fiscal years, other than the following:

⁵ The asterisk at the end of paragraph (b) of Amex Rule 121A as set forth below is part of the current text and relates to a note in the rule regarding look-back periods.

- (1) compensation for board service,
- (2) payments arising solely from investments in the company's securities,
- (3) compensation paid to an immediate family member who is a non-executive employee of the company or of a parent or subsidiary of the company,
- (4) compensation received for former service as an interim Chairman or CEO,
- (5) benefits under a tax-qualified retirement plan,
- (6) non-discretionary compensation, [or]
- (7) loans permitted under Section 13(k) of the Exchange Act,
- (8) loans from a financial institution provided that the loans (i) were made in the ordinary course of business, (ii) were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with the general public, (iii) did not involve more than a normal degree of risk or other unfavorable factors, and (iv) were not otherwise subject to the specific disclosure requirements of SEC Regulation S-K, Item 404, or
- (9) payments from a financial institution in connection with the deposit of funds or the financial institution acting in an agency capacity, provided such payments were (i) made in the ordinary course of business, (ii) made on substantially the same terms as those prevailing at the time for comparable transactions with the general public , and (iii) not otherwise subject to the disclosure requirements of SEC Regulation S-K, Item 404.*

(c) – (g) No change.

B. No change.

Commentary

.01 - .05 No change.

.06 In order to affirmatively determine that an independent director does not have a material relationship with the listed company that would interfere with the exercise of independent judgment, as specified in paragraph A, the board of directors of each listed company must obtain from each such director full disclosure of all relationships which could be material in this regard, including but not limited to any payments specified in paragraphs A(b)(8) and (9) .

* * * * *

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 IV 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

The Company Guide requires that the board of directors of most listed companies be comprised of a majority of independent directors. Section 121 of the Company Guide generally defines an independent director as “a person other than an officer or employee of the company or any parent or subsidiary” and requires that the board of directors of

each listed company affirmatively determine that an independent director has no material relationship with the company that would interfere with the exercise of independent judgment. In addition, Section 121 specifies certain relationships that will preclude a finding of independence, including, a director who accepts (or whose immediate family member⁶ accepts) any payment from the company (or any parent or subsidiary of the company⁷) in excess of \$60,000 during the current or any of the past three fiscal years.⁸ Compensation for board service, payments arising solely from investments in the company's securities, compensation paid to an immediate family member who is a non-executive officer employee of the company (or any parent or subsidiary of the company⁹), compensation received for former service as an interim Chairman or Chief Executive Officer, benefits under a tax-qualified retirement plan, non-discretionary compensation, or loans permitted under Section 13(k) of the Securities Exchange Act are not included in the \$60,000.¹⁰

⁶ An "immediate family member" includes the director's spouse, parents, children, siblings, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law or anyone who resides in the director's home (other than domestic employees). See Commentary .01 to Section 121 of the Amex Company Guide.

⁷ Amex states that the reference to a "parent or subsidiary" is intended to cover entities the issuer controls and consolidates with the issuer's financial statements as filed with the Commission (but not if the issuer reflects such entity solely as an investment in its financial statements). See Commentary .02 to Section 121 of the Amex Company Guide.

⁸ Amex states that the three year look-back period commences on the date the relationship ceases. For example, a director employed by the company is not independent until three years after such employment terminates.

⁹ See note 6.

¹⁰ See Section 121A(b) of the Amex Company Guide.

The Amex believes that certain standard, non-preferential transactions by financial institutions that technically involve “payments” by the financial institution to a director (or an immediate family member of the director) as a customer of the financial institution do not impair a director’s ability to exercise independent judgment absent preferential terms, and accordingly should not preclude a finding of independence. Consequently, the Amex is proposing to amend Section 121 of the Company Guide to specify that payments received by a director of a listed issuer from the issuer in connection with a banking or brokerage transaction entered into in the ordinary course of business on non-preferential terms will not be included in the types of payments that (if the applicable threshold is reached) would preclude the director’s independence. Such payments would include, for example, principal and interest payments on deposits, receipt of a loan check, and agency payments in connection with securities transactions.

The Exchange believes that exclusion of payments arising out of such transactions is consistent with the general intent of the Amex independence requirements, which are designed to prohibit relationships that would interfere with the exercise of independent judgment by an independent director. The fact that a director maintains a savings account or takes out a loan from a bank issuer, where the account is maintained or the loan was made in the ordinary course of business and on non-preferential terms (i.e., on the same terms available to other persons), should not impair the director’s independence because the director would have been able to obtain the loan or set up the account on those terms regardless of his or her relationship with the company.

In addition, the Amex is proposing to adopt new Commentary .06 to Section 121 of the Company Guide to clarify that, in order to determine that an independent director does not have a material relationship with the listed company that would interfere with the exercise of independent judgment, as required by Section 121A of the Company Guide, the board of directors of each listed company must obtain from each such director full disclosure of all relationships which could be material in this regard, and that such disclosure must include, but is not limited to, any payments in connection with banking or brokerage transactions entered into in the ordinary course of business on non-preferential terms.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act¹¹ in general and furthers the objectives of Section 6(b)(5) of the Act,¹² in particular, in that it is designed to perfect the mechanisms of a free and open market and the national market system, protect investors and the public interest, and promote just and equitable principles of trade.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Amex does not believe that the proposed rule change, as amended, will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

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

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

change.

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

The proposed rule change has been designated by the Amex as a “non-controversial” rule change pursuant to Section 19(b)(3)(A) of the Act¹³ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁴

The foregoing proposed rule change, as amended: (1) does not significantly affect the protection of investors or the public interest, (2) does not impose any significant burden on competition, and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest. Furthermore, the Amex gave the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change. Consequently, the proposed rule change, as amended, has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁵ and Rule 19b-4(f)(6) thereunder.¹⁶

Pursuant to Rule 19b-4(f)(6)(iii),¹⁷ a proposed “non-controversial” rule change does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The Amex has requested that the Commission waive the 30-day operative delay

¹³ 15 U.S.C. 78s(b)(3)(A).

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 17 CFR 240.19b-4(f)(6).

¹⁷ 17 CFR 240.19b-4(f)(6)(iii).

to permit the Exchange to implement the proposal immediately. The Amex submits that immediate effectiveness is appropriate in that a substantially similar rule change was recently adopted by the Nasdaq Stock Market and became effective upon filing,¹⁸ and the proposed rule change raises no new regulatory issues and is concerned solely with a matter that is not likely to engender adverse comments or require the degree of review attendant with more controversial filings.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission believes that the proposed rule change regarding ordinary-course, non-preferential payments is a reasonable clarification of the rules regarding director independence and that acceleration of the operative date should ease implementation of the new rule and help assure consistent application of corporate governance standards among listing markets. The Commission further believes that the additional proposed commentary to Amex's Independent Director rule, requiring boards of directors to obtain full disclosure from independent directors of all relationships with the company that could be material, including the types of payments described above, clarifies the obligation of boards in meeting their responsibilities and thereby enhances the rule's protections. For these reasons, the Commission designates the proposed rule change, as amended, to be operative immediately.¹⁹

At any time within 60 days of the filing of the proposed rule change, the

¹⁸ See Securities Exchange Act Release No. 49903 (June 22, 2004), 69 FR 38941 (June 29, 2004).

¹⁹ For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.²⁰

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-Amex-2004-60 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File No. SR-Amex-2004-60. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site

(<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed

²⁰ For purposes of calculating the 60-day abrogation period, the Commission considers the period to commence on August 23, 2004, the date that the Amex filed Amendment No. 1.

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 Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-Amex-2004-60 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²¹

Margaret H. McFarland
Deputy Secretary

²¹ 17 CFR 200.30-3(a)(12).