

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-53403; File No. SR-Amex-2006-04)

March 2, 2006

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Procedures for Denying Initial and Continued Listing

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 23, 2006, the American Stock Exchange LLC (“Amex” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Amex. On February 22, 2006, Amex filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange proposes to add new Section 127 and amend Sections 101, 401, 402, 710, 1002, and 1009 of the Amex Company Guide to increase the transparency of the process associated with staff determinations to deny the initial or continued listing of a company’s securities on the Amex.

The text of the proposed rule change is available on the Amex’s Web site at <http://www.amex.com>, at the Amex’s principal office, and at the Commission’s Public Reference Room.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Amendment No. 1 made technical changes to the rule text submitted in Exhibit 5.

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. 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

Sections 101 and 1002 of the Amex Company Guide provide broad discretionary authority to the Exchange to deny initial or continued listing to a company, the condition or business of which raises public interest or other qualitative concerns that could undermine investor confidence in Amex listed securities. The Exchange proposes to add new Section 127 and amend Sections 101 and 1002 of the Amex Company Guide to clarify the circumstances in which the Exchange generally uses this authority and provide greater transparency to listed companies and applicants.<sup>4</sup>

The proposed rule and rule amendments would specify that the Exchange has authority to deny initial listing to an applicant, impose additional or more stringent criteria on initial or continued listing of a company's securities, or delist a company's securities under the following circumstances:

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<sup>4</sup> The Commission notes that this proposed rule change is substantially similar to a proposal submitted by the National Association of Securities Dealers, Inc. and approved by the Commission. See Securities Exchange Act Release No. 52342 (August 26, 2005), 70 FR 52456 (September 2, 2005) (SR-NASD-2004-125).

- The listed company or applicant, or an individual associated with the listed company or applicant, has a history of regulatory misconduct;<sup>5</sup>
- The listed company or applicant files for protection under any provision of the federal bankruptcy laws or comparable foreign laws;
- The independent accountants of the listed company or applicant issue a disclaimer opinion on financial statements required to be audited;
- The financial statements of the listed company or applicant do not contain a required certification; or
- The Exchange determines that the listed company or applicant entity has violated or evaded applicable corporate governance standards (for example, by delisting from another marketplace in order to effect a violative transaction and seeking an Amex listing thereafter).

Proposed new Section 127 of the Amex Company Guide would explain the factors used by the Exchange in evaluating whether the regulatory misconduct of an individual associated with a company should be used as a basis to deny initial or continued listing, as well as remedial measures that may serve to mitigate public interest concerns. Section 127 would also state that Sections 101 and 1002 do not provide a basis for the Exchange to grant exemptions or exceptions from the enumerated initial or continued listing criteria.

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<sup>5</sup> Such individuals would typically be an officer, director, substantial security holder or consultant to the issuer. The Exchange proposes in new Section 127, Commentary .01 that an interest consisting of more than either 5% of the number of shares of common stock or 5% of the voting power outstanding of an issuer or party shall be considered a substantial interest and cause the holder of such an interest to be regarded as a substantial security holder. Telephone conversation between Jan Woo, Attorney, Division of Market Regulation, Commission, and Courtney McBride, Assistant General Counsel, Amex, on February 23, 2006.

The Exchange is also proposing to update its disclosure policies by amending Sections 402 and 1009 of the Amex Company Guide. These proposed amendments would conform the Amex disclosure time frames to those mandated by the Commission for current reports filed on Form 8-K, specifically to instructions provided under General Instruction B.1. to Form 8-K for material disclosed pursuant to Item 3.01 of Form 8-K (Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing), by reducing to four business days the time within which a listed company must publicly disclose that the Exchange has given it written notice that it is noncompliant with one or more of the continued listing standards. The proposed amendments would also extend the disclosure obligations applicable to a company that receives a written delisting notice to include a company that receives a written notice of noncompliance with a continued listing requirement. A written notice of noncompliance with a continued listing requirement may be in the form of either a Warning Letter or a Deficiency Letter.<sup>6</sup>

In addition, the Amex proposes certain clarifying amendments to Section 710 of the Amex Company Guide. Section 710(b) provides that an exception to the shareholder approval requirements contained in Sections 711, 712, and 713 may be made upon application to the Exchange when (i) the delay in securing shareholder approval would seriously jeopardize the financial viability of the enterprise, and (ii) reliance by the company on the exception is expressly approved by the audit committee of the company's board of directors or a comparable body of the board of directors. The Exchange proposes to add that the comparable body of the board of directors which may approve a company's reliance on the financial viability exception must be comprised solely of independent and disinterested directors. The Exchange also

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<sup>6</sup> Telephone conversation between Jan Woo, Attorney, Division of Market Regulation, Commission, and Courtney McBride, Assistant General Counsel, Amex, on February 23, 2006.

proposes to prohibit a company from issuing, or authorizing its transfer agent or registrar to issue or register the securities subject to the shareholder approval requirements until it has received written notification from the Exchange that the financial viability exception has been granted and the securities have been approved for listing.

Section 710 of the Amex Company Guide currently requires a company that receives the financial viability exception to provide notice to shareholders of its reliance on such exception ten days before issuance of the subject securities. The Exchange proposes to require increased disclosure by requiring the company to issue a press release ten days before issuance of the subject securities. Both the shareholder notice and press release would need to specify: (i) the terms of the transaction subject to the shareholder approval requirements (including the number of shares of common stock that could be issued and the consideration received), (ii) the fact that the company is relying on the financial viability exception to the stockholder approval rules, and (iii) that such reliance has been approved either by the audit committee or by another body of the board of directors that is comprised solely of independent and disinterested directors.

Finally, the Exchange proposes minor, technical changes to Section 401 of the Amex Company Guide.

## 2. Statutory Basis

The Exchange believes that the amended proposed rule change is consistent with Section 6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>8</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with

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<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

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 a national market system, and, in general, to protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change 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 change.

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

Within 35 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 90 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 the Exchange 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 amended proposed rule change 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](mailto:rule-comments@sec.gov). Please include File No. SR-Amex-2006-04 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Amex-2006-04. 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 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. 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 Number SR-Amex-2006-04 and should be submitted on or before [insert date 21 days from the date of publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

Nancy M. Morris  
Secretary

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<sup>9</sup> 17 CFR 200.30-3(a)(12).