

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55837; File No. SR-Amex-2006-99)

May 31, 2007

Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval to Proposed Rule Change and Amendment No. 1 thereto Relating to Reverse Mergers and Shareholder Approval for Change of Control Situations

I. Introduction

On October 5, 2006, the American Stock Exchange LLC (“Amex” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)¹ of the Securities Exchange Act (“Act”), and Rule 19b-4 thereunder,² a proposed rule change relating to reverse mergers. On February 14, 2007, the Exchange filed Amendment No. 1 to the proposed rule change.³ The proposed rule change was published for comment in the Federal Register on March 22, 2007.⁴ The Commission received no comments on the proposed rule change. This order approves the proposed rule change, as amended.

II. Description of the Proposal

The Exchange proposes to amend (i) Section 341 of the Amex Company Guide (“Guide”) to clarify the circumstances under which a listed issuer will be deemed to have engaged in a reverse merger thereby requiring the post-transaction entity to satisfy the initial

¹ 15 U.S.C. 78s(b)(1)

² 17 CFR 240.19b-4.

³ Amendment No. 1 makes revisions to the proposed rule text, including revisions conforming the proposed rule text to a filing submitted by The NASDAQ Stock Market LLC (“Nasdaq”) and approved by the Commission in the period following submission of the original filing (Securities Exchange Act Release No. 55052 (January 5, 2007), 72 FR 1569 (January 12, 2007) (SR-NASDAQ-2006-047)) and revisions incorporating an immediately effective filing submitted by Amex in the same period (Securities Exchange Act Release No. 55096 (January 12, 2007), 72 FR 2563 (January 19, 2007) (SR-Amex-2007-03)). Amendment No. 1 replaces and supersedes the original filing in its entirety.

⁴ See Securities Exchange Act Release No. 55477 (Mar. 15, 2007), 72 FR 13542.

listing standards and the process a listed issuer must follow when applying for initial listing in connection with a reverse merger and (ii) Section 713 of the Guide to require shareholder approval in connection with the issuance or potential issuance of additional listed securities that will result in a change of control of a listed issuer.

Section 341 of the Guide currently provides that if an issuer listed on the Amex engages in any plan of acquisition, merger or consolidation, the net effect of which is that the listed issuer is acquired by an unlisted entity, even if the listed issuer is the nominal survivor, the post-transaction entity is required to satisfy the initial listing standards. Such transactions are typically referred to as “Reverse Mergers.” Because the issuer resulting from a Reverse Merger is essentially a different entity from the listed issuer, Section 341 does not permit the post-transaction entity to remain listed on the Amex unless it qualifies as a new listing. The Exchange stated that this prohibition is intended to prevent “back door listings” whereby an unqualified entity attempts to obtain an Amex listing. Both the New York Stock Exchange LLC (“NYSE”)⁵ and Nasdaq⁶ have comparable provisions.

The Exchange stated that many Reverse Mergers are entered into for bona fide business reasons; however, in some cases listed issuers that are not in compliance with the continued listing standards, and face potential delisting, attempt to enter into Reverse Mergers with private entities in order to retain their Amex listing. In other situations, the Exchange explained that a listed issuer may be in compliance with the continued listing standards but the post-transaction entity would not satisfy the initial listing standards. In both of these cases, a change of control occurs but the listed issuer attempts to structure the transaction so that it will not be deemed a Reverse Merger under the current rule.

⁵ Section 703.08(E) of the NYSE Listed Company Manual.

⁶ Nasdaq Rule 4340(a).

The Exchange proposes amending Section 341 to provide greater clarity and transparency as to (i) what constitutes a Reverse Merger, (ii) the factors the Exchange will consider in determining whether a transaction or series of transactions constitute(s) a Reverse Merger, (iii) the consequences of entering into a Reverse Merger and (iv) the process a listed issuer must follow in connection with a Reverse Merger. The proposed rule change will provide that, in addition to meeting the initial listing standards, a listed company entering into a Reverse Merger will need to obtain shareholder approval in accordance with Section 713 in order to issue additional listed securities in connection with such Reverse Merger. In addition, while the determination of whether a Reverse Merger has occurred or will occur is to some degree subjective, the Exchange proposes to amend Section 341 to more clearly delineate the factors that will be considered by the Exchange in its analysis of a transaction.⁷

Section 341 currently recommends that listed issuers submit any proposed plan which could constitute a Reverse Merger to the Exchange for an informal opinion prior to the plan's promulgation. The Exchange stated that the intent of such provision is to permit Exchange staff to review the proposed transaction in order to determine if it constitutes a Reverse Merger and, in the case of a Reverse Merger, to review the post-transaction entity in order to confirm that it will meet initial listing standards. The Exchange proposes to make such process more transparent by requiring a listed issuer to submit an initial listing application with sufficient time to permit the

⁷ The Exchange's proposed Section 341 states that a "Reverse Merger" is: "any plan of acquisition, merger or consolidation whereby a listed company combines with, or into, a company not listed on the Exchange, resulting in a change of control of the listed company and potentially allowing such unlisted company to obtain an Exchange listing. In determining whether a change of control constitutes a Reverse Merger, the Exchange will consider all relevant factors, including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the listed company. The Exchange will also consider the nature of the businesses and the relative size of both the listed and the unlisted companies." See proposed Section 341 of the Guide.

Exchange to complete its review of the post-transaction entity and providing that delisting proceedings will be commenced if such initial listing application has not been approved prior to consummation of the Reverse Merger. The Commission approved a similar rule change filed by Nasdaq.⁸

In association with the proposed changes to Section 341, the Exchange also proposes to amend Section 713. Section 713 currently requires shareholder approval as a prerequisite to Exchange approval of applications to list additional shares issued in connection with a transaction (other than a public offering) which would involve the application of the initial listing standards in evaluating an acquisition of a listed company by an unlisted company under Section 341 of the Guide. The Exchange proposes revising Section 713 to require shareholder approval as a prerequisite to Exchange approval of additional listing applications when the issuance or potential issuance of additional securities will result in a change of control of a listed issuer, regardless of whether such change of control also constitutes a Reverse Merger. Additionally, the Exchange proposes changes to Sections 341 and 713 to clarify the relationship between their respective requirements. Both NYSE⁹ and Nasdaq¹⁰ require shareholder approval for change of control transactions and the Exchange believes it is necessary and appropriate to require listed issuers to obtain shareholder approval of any issuance or potential issuance of additional listed securities that will result in a change of control.

⁸ See supra note 3.

⁹ Section 312.03(d) of the NYSE Listed Company Manual.

¹⁰ Nasdaq Rule 4350(i)(1)(B).

III. Discussion

After careful review of the proposal, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹¹ In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,¹² which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and the national market system, and, in general, to protect investors and the public interest.

The Commission believes that the proposal will help listed companies by providing greater clarity as to the process a listed company must follow in connection with a reverse merger. More specifically, the Commission notes that the proposed rule change provides guidance to issuers on what constitutes a Reverser Merger under the Exchange's rules, as well as the consequences of such a transaction, including potential delisting. This additional guidance may be helpful to investors as well.

Finally, the Commission notes that the Exchange is clarifying and broadening its shareholder approval rules by requiring shareholder approval in all change of control situations, not just Reverse Mergers, which will protect investors and the public interest. This should allow investors of listed issuers to participate in important corporate decisions involving a change of control. While certain change of control situations would require shareholder approval under other provisions of the Guide, this proposal ensures that all change of control situations must be approved by shareholders, thereby strengthening the Exchange's shareholder approval

¹¹ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

¹² 15 U.S.C. 78f(b)(5).

requirements, and is consistent with comparable rules of the New York Stock Exchange and Nasdaq.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-Amex-2006-99) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Florence E. Harmon
Deputy Secretary

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).