

Third, Applicants seek the flexibility to list each Fund's VIPER Shares on any "national securities exchange," as defined in section 2(a)(26) of the Act ("Exchange"), and not exclusively on the American Stock Exchange, as stated in the Original VIPERs Application. Finally, Applicants seek to clarify two statements in the Original VIPERs Application in which the Original Applicants stated that (a) the product description for the Original Applicant Funds' VIPER Shares ("Product Description") would not contain information that was not also in the Fund's prospectus for VIPER Shares ("VIPER Shares Prospectus") and (b) the Product Description would include a website address where investors could obtain information on the composition and compilation methodology of the Fund's Target Index. Applicants state that because Form N-1A does not require them to include information about a Target Index's website, the Funds' VIPER Shares Prospectuses do not include such information. Applicants state that such information is, however, included in the Funds' Product Descriptions. Applicants state, as a clarification, that other than information about a Target Index's website, a Fund's Product Description does not contain information that is not also in its VIPER Shares Prospectus.

9. For the reasons set forth above and for the reasons set forth in the Original VIPERs Application, Applicants contend that the standards of sections 6(c) and 17(b) are satisfied.

#### *Applicants' Conditions:*

Applicants agree that any order granting the requested relief will be subject to the conditions of the Original VIPERs Order, except that conditions 1, 8 and 9 will be amended as follows:

1. Applicants will not register the VIPER Shares of a Future Fund by means of filing a post-effective amendment to a Future Fund's registration statement or by any other means, unless (a) Applicants have requested and received with respect to such VIPER Shares either exemptive relief from the Commission or a no-action letter from the Division of Investment Management of the Commission, or (b) such VIPER Shares will be listed on an Exchange without the need for filing pursuant to rule 19b-4 under the Securities Exchange Act of 1934.

8. Applicants' Web site, which is and will be publicly accessible at no charge, will contain the following information, on a per VIPER Share basis, for each Fund: (a) The prior business day's closing NAV and the Bid-Asked Price, and a calculation of the premium or

discount of the Bid-Asked Price in relation to the closing NAV; and (b) data for a period covering at least the four previous calendar quarters (or the life of a Fund, if shorter) indicating how frequently each Fund's VIPER Shares traded at a premium or discount to NAV based on the Bid-Asked Price and closing NAV, and the magnitude of such premiums and discounts. In addition, the Product Description for each Fund will state that Applicants' website has information about the premiums and discounts at which the Fund's VIPER Shares have traded.

9. The VIPER Shares Prospectus and annual report will include, for each Fund: (a) The information listed in condition 8(b), (i) in the case of the VIPER Shares Prospectus, for the most recently completed calendar year (and the most recently completed quarter or quarters, as applicable), and (ii) in the case of the annual report, for no less than the immediately preceding five fiscal years (or the life of the Fund, if shorter); and (b) the cumulative total return and the average annual total return for one, five and ten year periods (or life of the Fund, if shorter) of (i) a VIPER Share based on NAV and the Bid-Asked Price and (ii) the Fund's Target Index.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Jill M. Peterson,**

*Assistant Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-48863; File No. SR-Amex-2003-65]

### **Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the American Stock Exchange LLC and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 2 Relating To Enhanced Corporate Governance Requirements Applicable to Listed Companies**

December 1, 2003.

#### **I. Introduction**

On June 23, 2003, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and

Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend sections 101, 110, 120, 121, 401, 402, 610 and 1009 of the Amex Company Guide, and adopt new sections 801 through 808 of the Amex Company Guide to enhance the corporate governance requirements applicable to listed companies. The proposed rule change, among other things, would require each issuer listed on the Amex to comply with the standards for audit committees mandated by section 10A(m) of the Act<sup>3</sup> and Rule 10A-3 thereunder.<sup>4</sup> The proposed rule change also includes provisions relating to board independence and independent committees, codes of conduct, and other corporate governance issues. On September 9, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>5</sup> On October 31, 2003, the Commission published the proposed rule change, as modified by Amendment No. 1, for comment in the **Federal Register**.<sup>6</sup> The Commission received one comment letter on the proposal.<sup>7</sup> On December 1, 2003, the Exchange filed Amendment No. 2 to the proposal.<sup>8</sup> This Order approves the proposed rule change, provides notice of Amendment No. 2, and approves Amendment No. 2 on an accelerated basis.

#### **II. Description of Amended Proposal**

The proposed rule change, as amended, consists of comprehensive enhancements to the corporate governance requirements applicable to companies listed on the Amex. Some of these changes respond to Rule 10A-3, which requires each national securities

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

<sup>3</sup> 15 U.S.C. 78j-1(m).

<sup>4</sup> 17 CFR 240.10A-3.

<sup>5</sup> See Letter from Claudia Crowley, Vice President, Listing Qualifications, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated September 5, 2003 ("Amendment No. 1").

<sup>6</sup> See Securities Exchange Act Release No. 48706 (October 27, 2003), 68 FR 62109 (October 31, 2003) ("Notice").

<sup>7</sup> Letter from Dorothy M. Donohue, Associate Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, Commission, dated November 21, 2003 ("ICI Letter"). The ICI Letter supported the Exchange's proposal and, in particular, noted that provisions of the Amex proposal are analogous to rules of the New York Stock Exchange and The Nasdaq Stock Market, which were recently approved by the Commission. See *infra* note and accompanying text.

<sup>8</sup> See Letter from Claudia Crowley, Vice President, Listing Qualifications, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated November 26, 2003 ("Amendment No. 2"). Amendment No. 2 supersedes and replaces the original proposal and Amendment No. 1 in their entirety. The most significant changes to the proposed rule change that are contained in Amendment No. 2 are summarized in section II. below.

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

exchange and national securities association to have rules that comply with its requirements approved by the Commission no later than December 1, 2003. Other proposed changes relate to board of director composition and independence standards, audit committee composition and authority, compensation and nominating committees, and ethics and disclosure obligations, as discussed in detail in the Notice. The Amex's rule amendments will allow some leeway for small business filers. Under the proposed rule change, small business filers will be subject to the new corporate governance requirements, except that they will only be required to have a board of directors comprised of at least 50% independent directors and an audit committee of at least two independent directors.<sup>9</sup> Such issuers will, of course, be required to comply with Rule 10A-3.<sup>10</sup>

In Amendment No. 2, Amex revised various aspects of its proposal, in a manner that conforms many of its provisions with corporate governance rules of other self-regulatory organizations ("SROs"), which were recently approved by the Commission.<sup>11</sup> The specific proposed revisions included in Amendment No. 2 would:

- Substantially conform the compliance dates and transition periods to those mandated for audit committees by Rule 10A-3 under the Act and adopted by other marketplaces;<sup>12</sup>
- Provide phase-in periods with respect to certain requirements for

companies that list in conjunction with an initial public offering, are emerging from bankruptcy, cease to be controlled from companies, have staggered boards, or are transferring from other markets;

- Expand certain of the relationships that would preclude a finding of independence to apply not only to directors, but also to family members of directors;

- Exclude non-discretionary charitable match programs and loans permitted under Section 13(k) of the Securities Exchange Act from the definition of payments that would preclude a finding of independence;

- Exclude prior employment as an interim Chairman or Chief Executive Officer ("CEO"), as well as compensation received for such former service, from the relationships and payments that would preclude a finding of independence;

- Specify that business payments from or to an organization that a director (or an immediate family member) is a partner in, controlling shareholder of, or executive officer of, that would preclude a finding of independence (whether to or from the listed company) are tested against the consolidated gross revenues of the director's organization;

- Expand the scope of the relationships with the company's outside auditor that preclude a finding of independence;

- Apply a three year "look-back" to all relationships that would preclude a finding of director independence, but revise such "look-back" periods so that the independence tests applicable to independent directors who are not members of the audit committee, and certain "look-back" periods for independent directors who are members of the audit committee, would be only one year for the first year following Commission approval of the enhanced corporate governance requirements;

- Clarify that a director who qualifies as an audit committee financial expert pursuant to Commission rules is presumed to qualify as a financially sophisticated audit committee member under Amex rules, and conform the Amex rules to those adopted by other markets;

- Clarify the application of the corporate governance requirements to investment companies;

- Provide a different measure of independence for investment companies that is consistent with the Investment Company Act of 1940;<sup>13</sup>

- Clarify that audit committees of listed companies must adopt a formal audit committee charter that addresses

the audit committee's responsibilities, including those required by Rule 10A-3;

- Require that audit committees of investment companies must establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company;

- Codify that audit committees of listed companies must meet on at least a quarterly basis;

- Clarify that independent nominating and compensation committees may either take action or recommend that the board take action;

- Clarify that the new requirements relating to nominating decisions would not apply in cases where the right to nominate a director legally belongs to a third party, or the company is already subject to a legally binding obligation that requires a director nomination structure inconsistent with the new rule;

- Require a nominating committee charter or board resolution addressing the nominations process;

- Remove a provision that would have permitted one director holding 20% or more of the company's stock who is not independent as a result of being an officer of the company to serve on the nominations committee;

- Add a requirement that listed companies must notify the Exchange of any material non-compliance with the enhanced corporate governance requirements;

- Specify that the CEO of a listed company may not be present during voting or deliberations on his or her compensation, and state that compensation for all other officers must be determined, or recommended to the Board for determination, either by the compensation committee or a majority of the independent directors on the company's board of directors;

- Specify that a listed company's required code of conduct and ethics must be publicly available, and any waivers of the code for directors and executive officers must be disclosed within five days in a Commission Form 8-K; and

- Provide that the compensation committee or a majority of independent directors is not precluded from approving awards either with or without board ratification, as may be required to comply with applicable tax and state corporate laws.

<sup>9</sup> Companies that are not small business filers will be required under the proposed rule change to have a board of directors comprised of a majority of independent directors and an audit committee of at least three independent directors.

<sup>10</sup> In addition, the Amex proposal includes provisions that would prohibit a listed company from appointing or permitting an Exchange employee or Floor Member to serve on its board of directors, place certain restrictions on the division of a listed company's board of directors into classes, and include other small variations from the corporate governance provisions of other SROs.

<sup>11</sup> See Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003) (approval of File Nos. SR-NYSE-2002-33, SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141) ("NYSE/NASD Corporate Governance Release").

<sup>12</sup> The deadline for compliance with the audit committee requirements of Rule 10A-3 is the earlier of January 15, 2004, or October 31, 2004, (other than for foreign private issuers and small business issuers). The revisions to Amex rules regarding changes to board and committee composition and structure will become effective by the earlier of the issuer's first annual meeting after March 15, 2004, or October 31, 2004, (other than for foreign private issuers and small business issuers). Foreign private issuers and small business issuers must be in compliance with the Rule 10A-3 audit committee requirements and the new board and committee composition and structure provisions by July 31, 2005.

<sup>13</sup> 15 U.S.C. 80a-1 *et seq.*

### III. Discussion

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with the requirements of section 6(b) of the Act.<sup>14</sup> Specifically, the Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act,<sup>15</sup> in that it is designed, among other things, to facilitate transactions in securities; to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; 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; and does not permit unfair discrimination among issuers.

In the Commission's view, the proposed rule change will foster greater transparency, accountability, and objectivity in the oversight by, and decision-making processes of, the boards and key committees of Amex listed issuers. The proposal also will promote compliance with high standards of conduct by the issuers' directors and management. The Commission notes that the Amex has amended its proposal to harmonize it in many areas with rule changes recently approved by the Commission for the New York Stock Exchange, Inc. and the National Association of Securities Dealers, Inc.

In addition, in the Commission's view, the proposed rule change is consonant with Rule 10A-3, which requires that the rules of a national securities exchange prohibit the initial or continued listing of any security of an issuer that is not in compliance with the requirements of any portion of paragraph 9(b) or (c) of Rule 10A-3. In this regard, the proposed rule change will promote independent and objective review and oversight of an Amex-listed issuer's financial reporting practices.

The Commission believes that the provisions that the Amex has included to accommodate small business filers by requiring them to have 50%, rather than a majority, of their boards comprised of independent directors, and by requiring them to have two, rather than three, members on their audit committees, are reasonable.

<sup>14</sup> 15 U.S.C. 78(b). In approving the proposed rule change, as amended, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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

The Commission also believes that the provision added by Amex to prohibit a listed company from appointing or permitting an employee or Floor Member of the Exchange to serve on its board is reasonable and appropriate, as is the provision placing certain limits on the division of a listed company's board of directors into classes.

The Commission notes that other provisions proposed by Amex vary somewhat from corporate governance rules recently approved by the Commission for other SROs. For example, with respect to the proposed three-year "look back" periods that would apply to relationships that preclude a finding of director independence, certain "look-back" periods would cover only one year for the first year following Commission approval of the requirements, while other "look-back" periods would cover three years following Commission approval of the requirements. Amex also would require each company listed on the Exchange to adopt either a formal written charter or board resolution, as applicable, that addresses the nominations process. Amex also has included a provision to explicitly require an audit committee to meet on a quarterly basis. The Commission believes that these provisions are reasonable.

Furthermore, the Commission finds good cause, consistent with section 19(b)(2) of the Act,<sup>16</sup> to approve Amendment No. 2 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission notes that most of the changes proposed in Amendment No. 2 correspond to similar provisions approved by the Commission for other self-regulatory organizations,<sup>17</sup> and raise no new issues. With respect to changes proposed in Amendment No. 2 that are unique with respect to Amex, the Commission believes that these provisions are reasonable and that accelerating their approval will enable Amex to put into place its complete set of corporate governance standards for listed companies in time for the 2004 proxy season for the large majority of its listed companies. In addition, the Amex provisions relating to audit committees respond to the mandate of Rule 10A-3, which requires SROs to have such rules in place by December 1, 2003.

<sup>16</sup> 15 U.S.C. 78s(b)(2).

<sup>17</sup> See NYSE/NASD Corporate Governance Release, *supra* n. 11.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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 filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-Amex-2003-65 and should be submitted by December 29, 2003.

### V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act<sup>18</sup>, that Amendment No. 2 be granted accelerated approval and that the proposed rule change (File No. SR-Amex-2003-65), as amended, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>19</sup>

**Margaret H. McFarland**,  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48859; File No. SR-CHX-2003-23]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Stock Exchange, Incorporated to Amend Article XX, Rule 37(a)(4) Relating to the Definition of Preopening Order

December 1, 2003.

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>

<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</sup> 17 CFR 200.30-3(a)(12).

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

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