

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-50057; File No. SR-Amex-2004-50)

July 22, 2004

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the American Stock Exchange LLC Relating to the NASD's Sale of its Interest in the American Stock Exchange LLC to The Amex Membership Corporation

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,¹ as amended (the "Act"), and Rule 19b-4 thereunder,² notice is hereby given that on June 30, 2004, the American Stock Exchange LLC ("Amex" or the "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 Exchange. On July 15, 2004, the Exchange filed Amendment No. 1 to the proposal.³ On July 21, 2004, the Exchange filed Amendment No. 2 to the proposal.⁴ 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 Michael J. Ryan, Jr., Executive Vice President and General Counsel to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated July 13, 2004 ("Amendment No. 1"). Amendment No. 1 replaced Amex's original filing in its entirety.

⁴ See letter from Michael J. Ryan, Jr., Executive Vice President and General Counsel to Nancy Sanow, Assistant Director, Division, Commission, dated July 20, 2004 ("Amendment No. 2"). Amendment No. 2 corrected formatting errors in the Amex Constitution, the Amended and Restated Exchange Limited Liability Company Agreement, the Second Restated Certificate of Incorporation of The Amex Membership Corporation, and the Amended and Restated By-Laws of The Amex Membership Corporation that were filed with Amendment No. 1; no substantive changes to these documents were made in Amendment No. 2.

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

The Exchange is filing with the Commission proposed changes to its Constitution and certain other organizational documents in connection with a proposed transaction (“Transaction”) under which The Amex Membership Corporation (“MC”) will become the sole owner of the Exchange through the acquisition of 100% of the Class B Participation Interest in the Exchange from New NASD Holdings, Inc. (“NAHO”), a wholly owned subsidiary of the National Association of Securities Dealers, Inc. (“NASD”). The proposed changes to Amex’s Constitution, together with the Amended and Restated Exchange Limited Liability Company Agreement, the Second Restated Certificate of Incorporation of MC and the Amended and Restated By-Laws of MC are collectively referred to herein as the “proposed rule change.” The text of the proposed rule change is available for viewing on the Commission’s Web site, www.sec.gov/rules/sro.shtml, and at the Exchange and the Commission.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 Exchange 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 Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

⁵ The Commission notes that the texts of these documents that appear on the Commission’s Web site are the texts that were filed as part of Amendment No. 2.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to implement changes to the current Constitution of the Exchange that will become effective at the time of the closing of the Transaction, as well as changes to the current Exchange Limited Liability Company Agreement, MC Certificate of Incorporation and MC By-laws. On February 7, 2004, the Board of Directors of MC, which corporation is currently the owner of 100% of the Class A Participation Interest in the Exchange, approved the terms of an agreement (the "Transaction Agreement") pursuant to which it, through a newly formed, wholly owned subsidiary of MC ("MC Acquisition Sub"), will acquire 100% of the Class B Participation Interest in the Exchange from NAHO, a wholly owned subsidiary of the NASD, giving MC sole ownership of the Exchange.⁶ On February 26, 2004, the NASD Board of Governors unanimously approved the Transaction. On February 27, 2004, the Special Committee of the Board of Governors of the Exchange⁷ unanimously determined that the Transaction was in the best interests of the Exchange and, subject to execution of

⁶ Ownership interests in American Stock Exchange LLC currently consist of a Class A Participation Interest held by MC and a Class B Participation Interest held by NAHO.

⁷ In connection with the Transaction, the Exchange Board of Governors, recognizing that certain of its members had actual or possible conflicts of interest in connection with the Transaction by virtue of their service on the NASD Board of Governors and the MC Board of Directors, recommended that the Special Committee consisting solely of Governors who were not members of the NASD Board of Governors or the MC Board of Directors be established. On December 11, 2003, the Exchange Board of Governors established the Special Committee to consider whether the Transaction is in the best interests of the Exchange and to make recommendations to the Exchange Board of Governors concerning actions to be taken by such Board in connection with the Transaction.

a regulatory services agreement, recommended that the Board of Governors of the Exchange (each member of such Board, a “Governor”) consider and approve the Transaction. In connection with the Exchange member approval of the Transaction, MC sent to all the Exchange regular and options principal members (referred to collectively as “Members”) and seat owners an Information Memorandum dated February 17, 2004, which was supplemented on March 2 and March 12, 2004, respectively, describing the Transaction in detail. Attached as exhibits to the Information Memorandum were the Transaction Agreement (including exhibits thereto), the amended Exchange Constitution, the Exchange Amended and Restated Limited Liability Company Agreement (the “Amended Exchange LLC Agreement”) the Second Restated MC Certificate of Incorporation, and the Amended and Restated By-Laws of MC (the “Amended MC By-Laws”).⁸ At a Special Meeting of Members held on March 18, 2004, the Members approved the Transaction. On March 31, 2004, the Board of the Exchange approved the Transaction⁹, and on April 30, 2004, the regulatory services agreement was executed by the Exchange and the NASD. On June 24, 2004, the Board of MC approved the final forms of the Exchange and MC governance documents, including the Exchange

⁸ Additional changes have been made to these governance documents since the distribution of the Information Memorandum and Supplements thereto to the Members and seat owners prior to the Special Meeting of Members on March 18, 2004. The Information Memorandum advised Members that the amendments to these governance documents required SEC approval and were subject to “such other changes that may be requested by the SEC that are reasonably acceptable to each of the Exchange, NASD and [MC].”

⁹ At the March 31 meeting, the Exchange Board also approved the then-current forms of Exchange and MC governance documents.

Constitution, that are filed herein.¹⁰ It is expected that in July 2004 the Board of the Exchange will approve the final forms of the Exchange and MC governance documents, including the Exchange Constitution. The Exchange states that, for the purpose of this filing, no further action by the Exchange Board or membership is required to be taken. The Exchange represents that no other changes to the rules of the Exchange are required to be made as a result of the Transaction.

The following is an overview of the key terms of the Transaction.

A. Acquisition by MC of the Class B Participation Interest

As stated previously, MC will, through MC Acquisition Sub, acquire 100% of the Class B Participation Interest in the Exchange from NAHO, a NASD subsidiary. As a result, upon consummation of the Transaction, MC will beneficially own 100% of the equity of the Exchange. MC Acquisition Sub will be formed for the sole purpose of acquiring and holding the Class B Participation Interest; it is being used to avoid a technical liquidation of the Exchange as a result of the closing of the Transaction.

Following the consummation of the Transaction, the Class B Participation Interest will represent a non-voting interest in the Exchange; the Class A Participation Interest, which will continue to be held directly by MC, will represent the sole voting interest in the Exchange. In addition, all rights to trade through the facilities of the Exchange will continue to be owned by MC.

¹⁰ Telephone conversation between Mark Underberg, Esq., Counsel to MC, Paul, Weiss, Rifkind, Wharton & Garrison LLP, and Heather Seidel, Attorney Fellow, and Rebekah Liu, Special Counsel, Division, Commission, on July 19, 2004.

B. Restructuring of Existing Debt

At the closing of the Transaction, NASD and the Exchange will restructure an existing \$50 million loan owed by the Exchange to NASD. Under the terms of the arrangement, among other things, the Exchange will have the ability to satisfy all obligations under this loan in full for \$25 million plus accrued interest if it is repaid within the first year of the closing of the Transaction.

C. Extension of a Revolving Credit Facility

At the closing of the Transaction, NASD and the Exchange will enter into a Revolving Credit Facility, pursuant to which the Exchange will have the ability to borrow from NASD up to a maximum, at any one time, of \$25 million.

D. Unwinding of the 1998 Transaction

Subject to the terms of the Transaction Agreement, the agreements relating to the 1998 transaction whereby NASD acquired the Class B Participation Interest in the Exchange (the “1998 Transaction”), including the 1998 Transaction Agreement and the 1998 Technology Transfer Agreement, will be terminated and the 1998 Limited Liability Company Agreement of the Exchange will be amended. As the Transaction effectively results in an unwinding of the 1998 Transaction, NASD, the Exchange, and MC will enter into certain mutual releases of obligations, including those arising under the 1998 Agreements and otherwise related to the 1998 Transaction.

E. Effect of the Transaction on Members

The existing rights and obligations of the Members regarding trading through the Exchange will not be affected by the Transaction. Trading rights will continue to be owned by MC and represent the right to trade through the facilities of the Exchange. In connection with the termination of the 1998 Transaction Agreement, the Members will

no longer have the special rights to approve material market changes to the Exchange's equity and options businesses that were put in place at the time NASD took control of the Exchange. However, no amendment to the Exchange Constitution that would result in a material change in the market structure or operations of the Exchange shall be made without first obtaining the consent from the Board of Directors of MC. In addition, Members will have the ability to elect the Exchange Board of Governors and the MC Board of Directors.

F. Seat Fund Distribution

NAHO will pay in full the remaining commitment under the 1998 Seat Fund Program to the owners of regular and options principal memberships, which is an aggregate of approximately \$17.144 million (including accrued interest) as of January 31, 2004. Such amount will be distributed pro rata to the owners of regular and options principal memberships, with each regular and options principal membership receiving an equal amount of approximately \$20,483, plus additional accrued interest on such amount at an annual rate of 5% from January 31, 2004 through the closing of the Transaction.

G. Institution of New Governance Structures for Both the Exchange and MC

The Exchange Constitution and the 1998 Limited Liability Company Agreement of the Exchange and the Certificate of Incorporation and By-Laws of MC will be amended to, among other things, institute new governance structures for both the Exchange and MC. The proposed governance structure for the Exchange provides for a Board of Governors selected by its Members, who will also have the opportunity to vote on a "pass-through" basis on certain significant matters involving the Exchange, including the sale, issuance, transfer or other disposition of any equity security of the Exchange or of any notes or debt securities of the Exchange containing equity features, or

the issuance of any new trading rights by the Exchange. The new governance provisions also will provide that the Exchange Board of Governors will be largely independent and will have board committees composed primarily of independent Governors with substantial authority over compensation, audit, regulatory and corporate governance matters, as well as the nomination of Governors to serve on the Exchange Board of Governors. The proposed changes are intended to reflect “best practices” in the rapidly evolving corporate governance area, while at the same time ensuring fair representation of various constituencies on the Exchange Board of Governors. The corporate governance structure of MC also will change in that its Board of Directors will be elected by the Members of MC and will consist of five persons who do not necessarily serve on the Exchange Board of Governors.

A summary of the new Exchange governance structure, as provided in the Exchange Constitution, the Amended and Restated Exchange Limited Liability Agreement, the Second Restated MC Certificate of Incorporation and the Amended MC By-Laws, is set forth below. The text of the proposed rule change is available for viewing on the Commission’s Web site, www.sec.gov/rules/sro.shtml, and at Amex and the Commission.

(i) The Exchange Board of Governors

The Exchange Board of Governors currently consists of eighteen members.¹¹ Within six months after the closing of the Transaction, the Exchange will transition from an eighteen member Board of Governors to a new Board consisting of fifteen Governors: (a) nine of the Governors will be “Independent Governors” and (b) six of the Governors

¹¹ It is expected that at least one Governor will resign from the Exchange Board of Governors upon the closing of the Transaction.

will be “Industry Governors” as each is defined below. This six-month transition period will facilitate a phase-in of the new governance structure of the Exchange. Following the closing of the Transaction, the Board of Governors of the Exchange will form the initial Amex Nominating and Corporate Governance Committee, which will select nominees for Governor for the first election during the six-month transition period. By the end of the six-month transition period, the Members will have elected a new Board of Governors of the Exchange from and among these nominees or any other candidates nominated by the Members through petition.

At the first election of the Exchange Board of Governors during the six-month transition period, eight of the fifteen Governors will be elected to an initial two-year term and the remaining seven Governors will be elected to an initial one-year term.¹² Thereafter, there will be an annual meeting for the election of Governors to succeed those Governors whose terms have expired. All Governors elected at the annual meeting for the election of Governors will serve two-year terms and will hold office until their successors are elected. No Governor (other than the Management Governor, as defined below) who has served four consecutive terms as a Governor will be eligible for election as a Governor except after an interval of two years; provided, however, that service on the Exchange Board of Governors prior to January 1, 1999 will not be taken into account for these purposes.¹³

¹² The slate of initial eight Governors serving two-year terms and the initial Governors serving one-year terms shall consist of Independent Governors and Industry Governors in approximately equal proportions.

¹³ See Article II, Section 1 of the Exchange Constitution.

Each Governor will, in exercising his or her powers and performing his or her duties, comply with the federal securities laws and the rules and regulations thereunder and cooperate with the Commission pursuant to its regulatory authority and take into consideration the self-regulatory function of the Exchange and his or her obligations under the Act and the rules thereunder, including, without limitation, Section 6(b)¹⁴ of the Act.¹⁵

The nine Independent Governors will not be officers or employees of, and will have no material business relationship with, the Exchange and the holders of the Class A and Class B Participation Interests, will not be directors of the holders of the Class A or Class B Participation Interest, and will not be (i) Members, lessors or lessees of memberships, (ii) employed by, or affiliated or associated with, any entity that (x) is a Member, (y) otherwise has trading rights or privileges on the Exchange or (z) is a broker or dealer, or (iii) directors, officers or employees of an issuer of securities that are listed on the Exchange. The Independent Governors will meet such additional criteria for independence or otherwise, as are not inconsistent with the criteria above as may be established by the Amex Nominating and Corporate Governance Committee from time to time.¹⁶

Of the six Industry Governors of the Exchange, (i) two will be persons who spend a substantial portion of their time on the floor of the Exchange (the “Floor Governors”); (ii) one will be the owner of a regular or options principal membership (the “Membership

¹⁴ 15 U.S.C. 78f(b).

¹⁵ See Article II, Section 3 of the Exchange Constitution.

¹⁶ See Article II, Section 1 of the Exchange Constitution.

Governor”); (iii) one will be affiliated with regular or associate member organizations that engage in a business having substantial direct contact with public securities customers (the “Upstairs Governor”); (iv) one will be a director, officer, employee or representative of an issuer of securities that are listed on the Exchange (the “Listed Company Governor”); and (v) one will be the Exchange’s Chief Executive Officer (the “Management Governor”).¹⁷

The nominees submitted to the Members for election as Governors upon the nomination of the Amex Nominating and Corporate Governance Committee will reflect the applicable terms of office and the classifications of Governors as set forth above.¹⁸

The Chairman of the Exchange Board of Governors may be the Management Governor or any Independent Governor. If the Management Governor is designated as the Chairman of the Exchange Board of Governors, the Board will also designate an Independent Governor as the “Lead Governor” to preside over executive sessions of the Exchange Board of Governors. The Management Governor will not participate in executive sessions (i.e., meetings of the Exchange Board of Governors without management or staff of the Exchange). The Exchange will publicly disclose the Lead Governor’s name and a means by which interested parties may communicate with the Lead Governor. If a Lead Governor has been designated by the Exchange Board of Governors, the Lead Governor will exercise the powers and discharge the duties of the

¹⁷ See Article II, Section 1 of the Exchange Constitution.

¹⁸ See Article I, Section 1.14 of the Amended MC By-Laws.

Chairman in calling and presiding at meetings of the Exchange Board of Governors in the case of the absence or inability to act of the Chairman.¹⁹

(ii) The Exchange Nomination and Election Procedures

During the six-month transition period, the Members will elect a new Board of Governors of the Exchange that will be composed of fifteen members. Eight of the fifteen Governors will be elected to an initial two-year term and the remaining seven Governors will be elected to an initial one-year term.²⁰ The first year of each term will be extended or shortened depending upon whether the first election is held before or after July 1, 2004. Thereafter, there will be an annual meeting for the election of Governors to succeed those Governors whose terms have expired. After the election of the new Exchange Board of Governors, all Governors elected at the annual meeting for the election of Governors will serve two-year terms and will hold office until their successors are elected. All candidates to be submitted to the Members for election as Governors, members of the Amex Adjudicatory Council (“Council Members”) and Trustees of the Gratuity Fund (“Trustees”) will be selected by either (i) the Amex Nominating and Corporate Governance Committee or (ii) by petition of the Members to the Amex Nominating and Corporate Governance Committee.²¹

The Amex Nominating and Corporate Governance Committee will report to MC at least eight weeks prior to the date of the annual meeting of the Members, the names of candidates nominated by it as Governors, Council Members and Trustees. The report of

¹⁹ See Article II, Section 3 of the Exchange Constitution.

²⁰ See supra note 9.

²¹ See Article III, Section 1 of the Exchange Constitution.

the Amex Nominating and Corporate Governance Committee will be promptly disseminated or made available to the Members by posting or other appropriate means and will be promptly forwarded to the Secretary of MC for mailing to the Members in accordance with the Amended MC By-Laws (as in effect on the effective date of the amended Exchange Constitution or as amended in accordance with section 9.01 of such By-Laws as in effect on the effective date of the amended Exchange Constitution).²²

The Members may propose nominees for Governors, Council Members and Trustees to the Amex Nominating and Corporate Governance Committee for consideration by written submission filed with the Secretary of the Exchange for delivery to the Amex Nominating and Corporate Governance Committee not less than 12 weeks prior to the date of the annual meeting of the Members. In the event that any question is raised as to whether any candidate meets the criteria for the appropriate classification, such matter shall be determined by the Amex Nominating and Corporate Governance Committee, subject to the right of appeal to the full Board of Governors.²³

Members may also nominate candidates for Governors, Council Members and Trustees by written petition filed with the Amex Nominating and Corporate Governance Committee within three weeks after the dissemination of the report of the Amex Nominating and Corporate Governance Committee. In the event that any question is raised as to the validity of the signatures set forth on a petition or whether any candidate meets the criteria for the appropriate classification, such matter shall be determined by the Amex Nominating and Corporate Governance Committee, subject to the right of

²² See Article III, Section 2 of the Exchange Constitution.

²³ See Article III, Section 3 of the Exchange Constitution.

appeal to the full Board of Governors. The persons nominated by valid petition shall be deemed nominees for the offices and positions set forth in such petition and shall be included on the ballot sent to MC by the Amex Nominating and Corporate Governance Committee. A statement of the candidates nominated by petition will be promptly disseminated or made available to the Members by posting or other appropriate means and will be promptly forwarded to the Secretary of MC for mailing to the Members in accordance with the Amended MC By-Laws (as in effect on the effective date of the amended Exchange Constitution or as amended in accordance with section 9.01 of such By-Laws as in effect on the effective date of the amended Exchange Constitution). Such nominees will then be voted on by the MC Members.²⁴

All Exchange Governors, Council Members and Trustees will be elected by a plurality of votes cast by the Members.²⁵ Thereafter, MC will vote its Class A Participation Interest in the Exchange to elect those Governors, Council Members and Trustees selected by the vote of the Members.

The time periods set forth above may be equitably adjusted by the Amex Nominating and Corporate Governance Committee with respect to the first election of Governors occurring following April 1, 2004, to facilitate a prompt initial election;

²⁴ See Article III, Section 4 of the Exchange Constitution.

²⁵ The Exchange Constitution, as amended, provides that the Chairman of the Gratuity Fund shall make a report to the Chairman of the Exchange Board of Governors regarding the condition of the Gratuity Fund, rather than to the Chief Executive Officer of the Exchange, as provided by the current Exchange Constitution.

provided, however, in no event shall the petition period described in the proceeding paragraph be less than 10 business days.²⁶

(iii) Matters Requiring Consent of MC or Members²⁷

The amended Exchange Constitution will prohibit the Exchange, without MC's consent, from (i) selling, issuing, transferring or otherwise disposing of any limited liability company interest or other equity security of the Exchange or any notes or debt securities of the Exchange containing equity features, (ii) issuing any new trading rights, or (iii) issuing additional memberships. Any consent of MC requested by the Exchange to take such actions will only be granted by MC upon the affirmative vote of a majority of the Members.²⁸ In addition, without the affirmative vote of a majority of the Members, MC may not sell, issue, transfer or otherwise dispose of any equity security of the Exchange or any notes or debt securities of the Exchange containing equity features.²⁹

The amended Exchange Constitution will also provide that certain of its provisions may not be amended without the consent of MC. The provisions requiring consent from the board of MC to amend include:

- Article II, Section 1 (Classification of the Exchange Board of Governors);
- Article II, Section 6 (Standing Committees);
- Article III (Nomination and Election Procedures);

²⁶ See Article III, Section 5 of the Exchange Constitution.

²⁷ See Article II, Section 8 and Article XIII, Section 1 of the Exchange Constitution and Sections 7, 8 and 9 of the Second Restated MC Certificate of Incorporation.

²⁸ See Sections 7(a) and 9 of the Second Restated MC Certificate of Incorporation.

²⁹ See Section 7(b) of the Second Restated MC Certificate of Incorporation.

- Article XIII, Sections 1 and 3 (Procedure, Adoption of Amendments Requiring the Consent of MC); and
- Any amendment to the Constitution that would result in a material change in the market structure or operations of the Exchange.

Other than the provisions above, the provisions of the amended Exchange Constitution may be amended or repealed, and new provisions may be adopted, only if approved by a majority of Governors then in office in accordance with the procedure as specified in Article XIII of the amended Exchange Constitution.

(iv) Officers of the Exchange³⁰

A Chief Regulatory Officer will be added to the Chief Executive Officer, Treasurer and Secretary, as the officers of the Exchange. The Chief Regulatory Officer will be responsible for the management and administration of the regulatory functions of the Exchange and will be appointed by the Regulatory Oversight Committee.³¹ The Chief Regulatory Officer will report directly to the Regulatory Oversight Committee and to the Chief Executive Officer (or the Chief Executive Officer’s designee). The Exchange Board of Governors will have the power to remove the Chief Regulatory Officer only with the advice and consent of the Regulatory Oversight Committee. The Treasurer and Secretary will continue to be appointed by the Chief Executive Officer, subject to the approval of the Exchange Board of Governors. In addition, internal auditors shall report directly to the Audit Committee and (to the extent that they are

³⁰ See Article II, Section 4 of the Exchange Constitution.

³¹ See Section entitled “Regulatory Oversight Committee” in Section II.G(v) of this Notice, below.

officers or employees of the Exchange)³² to the Chief Executive Officer or the Chief Executive Officer's designee and shall not be removed without the advice and consent of the Audit Committee.

(v) Standing Committees of the Exchange³³

The amended Exchange Constitution will provide for the creation of a number of new standing committees of the Exchange composed primarily of independent Governors. Specifically, the amended Exchange Constitution will provide for (i) a Nominating and Corporate Governance Committee, (ii) an Executive Committee, (iii) an Audit Committee, (iv) a Regulatory Oversight Committee, and (v) a Compensation Committee. Any power that has been delegated to any such Standing Committee may not be delegated to any other committee formed by the Exchange Board of Governors.³⁴

Amex Nominating and Corporate Governance Committee

The Amex Nominating and Corporate Governance Committee will be appointed by the Exchange Board of Governors and will consist of three Governors, two of whom shall be Independent Governors and one of whom shall be the Membership Governor, as established by resolution adopted by a majority of the Board of Governors then in office.

³² After the closing of the Transaction, it is expected that NASD will continue to provide the internal audit function services pursuant to a transition services agreement with the Exchange. Consequently, the internal auditors will not initially be the officers or employees of the Exchange.

³³ See Article II, Section 6 of the Exchange Constitution.

³⁴ To establish the Standing Committees as described in this Section II.A.1.G.(v) and facilitate the transition, Industry Governors may serve as members of the Standing Committees until the earlier of (i) the six-month anniversary of the closing of the acquisition by MC (or MC Acquisition Sub) of the Class Participation B Interest (the "Class B Interest Acquisition Closing Date") or (ii) the date of the election of the Board of Governors first succeeding the Class B Interest Acquisition Closing Date.

The Amex Nominating and Corporate Governance Committee will, among other things:

- (i) establish criteria and procedures for the nomination of Governors, Council Members and Trustees;
- (ii) review the qualifications of and, when necessary and appropriate, interview candidates who may be proposed for nomination as Governors, Council Members and Trustees;
- (iii) submit to MC, in its capacity as the Class A Interestholder, a list of nominees for the election of Governors, Council Members and Trustees;
- (iv) monitor and consider the Exchange's corporate governance practices;
- (v) consider and make recommendations concerning the composition, organization and functions of the Exchange Board of Governors;
- (vi) review periodically the performance of the Exchange Board of Governors;
- (vii) review periodically the Exchange Constitution;
- (viii) make periodic reports to the entire Exchange Board of Governors on such matters within its powers and responsibilities as the Board of Governors may specify; and
- (ix) perform such other duties in connection with the selection, election or termination of the Governors, Council Members and Trustees or other corporate governance matters as the Exchange Board of Governors may request.

Any vacancy in the Amex Nominating and Corporate Governance Committee will be filled by its remaining members, who will elect a Governor qualified to fill the vacancy. The NASD Nominating Committee will cease to exist upon the closing of the Transaction.

Executive Committee

The Executive Committee will be appointed by the Exchange Board of Governors, upon the recommendation of the Amex Nominating and Corporate Governance Committee, and will consist of three to five Governors, at least a majority of whom will be Independent Governors and at least one of whom shall be an Industry

Governor. The Executive Committee will have reasonable access during normal working hours to all information (including all books and records) respecting the Exchange and its assets. The Executive Committee, to the extent permitted by law, will have and may exercise, when the Exchange Board of Governors is not in session, all powers of the Exchange Board of Governors regarding the supervision of the management of the business and affairs of the Exchange.

Audit Committee

The Audit Committee will be appointed by the Exchange Board of Governors, upon the recommendation of the Amex Nominating and Corporate Governance Committee, and will consist of three to five Independent Governors. The Audit Committee will: (i) have the authority to consider the qualification of the Exchange's independent public accountants, to make recommendations to the Exchange Board of Governors as to their selection and retention, and to review and resolve disputes between such independent public accountants and management relating to the preparation of the annual financial statements; (ii) confer with the Exchange's independent public accountants to determine the scope of the audit that such accountants will perform; (iii) receive reports from the independent public accountants and transmit such reports to the Exchange Board of Governors, and after the close of the fiscal year, transmit to the Exchange Board of Governors the financial statements certified by such accountants; (iv) inquire into, examine and make comments on the accounting procedures of the Exchange and the reports of the independent public accountants; (v) consider and make recommendations to the Exchange Board of Governors upon matters presented to it by the officers of the Exchange pertaining to the audit practices and procedures adhered to by the Exchange; (vi) appoint the internal auditors of the Exchange (who shall report

directly to the Audit Committee and who shall not be terminated without the advice and consent of the Audit Committee; to the extent that such internal auditors are officers or employees of the Exchange, they shall also report to the Chief Executive Officer or the Chief Executive Officer's designee); and (vii) make periodic reports to the entire Exchange Board of Governors on such matters within its powers and responsibilities as the Exchange Board of Governors may specify.

Regulatory Oversight Committee

The Exchange will establish a Regulatory Oversight Committee which will: (i) have authority to determine the Exchange's regulatory scheme, programs, budget and staffing proposals annually; (ii) appoint and direct the Chief Regulatory Officer; (iii) advise the Compensation Committee with respect to and approve the compensation (or any change thereto) of the Chief Regulatory Officer; (iv) be responsible for assessing regulatory performance on a regular basis; (v) have the authority to recommend the adoption of rules to the Exchange Board of Governors concerning such matters as may be specified in the Regulatory Oversight Committee's charter; and (vi) make periodic reports to the entire Exchange Board of Governors on such matters within its powers and responsibilities as the Exchange Board of Governors may specify. The Chief Regulatory Officer will report directly to the Regulatory Oversight Committee and to the Chief Executive Officer (or the Chief Executive Officer's designee).

The Regulatory Oversight Committee will be appointed by the Exchange Board of Governors, upon the recommendation of the Amex Nominating and Corporate Governance Committee, and will consist of three to five Independent Governors and one Industry Governor. The Independent Governors serving as members of the Regulatory Oversight Committee will be the only voting members of the committee. The Industry

Governor serving as a member of the Regulatory Oversight Committee will be a non-voting member. The Chief Regulatory Officer will report directly to the Regulatory Oversight Committee and to the Chief Executive Officer (or the Chief Executive Officer's designee). The Exchange Board of Governors will have the power to remove the Chief Regulatory Officer only with the advice and consent of the Regulatory Oversight Committee.

Compensation Committee

The Compensation Committee will be appointed by the Exchange Board of Governors, upon the recommendation of the Amex Nominating and Corporate Governance Committee, and will consist of three to five Independent Governors. The Compensation Committee will have and may exercise all of the authority of the Exchange Board of Governors in administering the Exchange's management compensation plans, and will be responsible for, among other things: (i) reviewing and approving performance goals relevant to the compensation of the Chief Executive Officer and evaluating the Chief Executive Officer's performance in achieving such goals, and recommending the compensation of the Chief Executive Officer to the Exchange Board of Governors; (ii) recommending to the Exchange Board of Governors the compensation of executive officers of the Exchange; (iii) causing to be publicly disclosed on an annual basis the compensation (and methodology behind such compensation) of the Governors and the five most highly compensated officers of the Exchange; and (iv) making periodic reports to the entire Exchange Board of Governors on such matters within its powers and responsibilities as the Exchange Board of Governors may specify.

(vi) Seat Owners Advisory Committee³⁵

Under the amended Exchange Constitution, the Exchange Board of Governors will create and consult with the Seat Owners Advisory Committee (“SOAC”), consisting of representatives of various constituencies of the Exchange as SOAC shall deem appropriate.

(vii) Amex Adjudicatory Council³⁶

The Amex Adjudicatory Council shall consist of six individuals, three of whom shall be Industry Governors (“Industry Council Members”), and three of whom shall be Independent Governors (“Independent Council Members”).³⁷ All Council Members shall be nominated and elected in accordance with the procedures as described above in Section II.A.1.G.(ii) of this Notice. In the event that a Council Member is precluded from participating in the Council’s consideration of a particular matter due to a conflict of interest, the Board of Governors shall appoint a Governor within the same classification for the position to serve as a substitute for such Council Member with respect to the particular matter. In the event that a Governor fitting the relevant classification is not available to serve as a substitute, the Board of Governors may appoint a person who would be qualified to serve as a Governor within such classification (Industry Governor or Independent Governor). If a position on the Amex Adjudicatory Council becomes

³⁵ See Article II, Section 3 of the Exchange Constitution.

³⁶ See Article II, Section 7 of the Exchange Constitution.

³⁷ Under the current Exchange Constitution, the Amex Adjudicatory Council consists of three floor governors (who spend a substantial part of their time on the floor of the Exchange) and three public governors (who are the representatives of the public (i) none of whom is, or is affiliated with, a broker or dealer in securities and (ii) all of them are nominated by the NASD Nominating Committee).

vacant, whether because of death, disability, disqualification, removal or resignation, the Board of Governors shall appoint a Governor within the same classification (Industry or Independent Council Member) to fill the vacancy until the next annual election of such Council members.³⁸

(viii) Confidential Information³⁹

All confidential information of the Exchange pertaining to the self-regulatory function of the Exchange, including all books and records of the Exchange reflecting such confidential information (including but not limited to regulatory investigations, examinations, disciplinary matters, and to the extent designated by the Exchange as confidential, trading data and trading practices) will be retained in confidence by each Governor, the Exchange and its personnel, and will not be used by each Governor, the Exchange and its personnel for any non-regulatory purposes and shall not be made available to any persons (including, without limitation, any Members of the Exchange) except that such confidential information may be disclosed: (i) to those personnel of the Exchange and to members of the Board of Governors of the Exchange to the extent necessary or appropriate to properly discharge the self-regulatory responsibilities of the Exchange; (ii) to the extent required by applicable statute, rule or regulation or any court of competent jurisdiction; and (iii) to the extent that such confidential information has become generally available publicly through no fault of the Exchange or its Governors, officers, employees or advisors. The purpose of this provision is to help ensure that

³⁸ Under the current Exchange Constitution, the Board of Directors of MC was authorized to fill such vacancies.

³⁹ See Article II, Section 3 of the Exchange Constitution.

confidential information relating to the Exchange's self-regulatory function is accorded appropriate confidential treatment and is not misused.

Notwithstanding the foregoing, such confidential information of the Exchange shall be subject at all times to inspection and copying by the Commission at no additional cost to such Commission. Nothing in the Exchange Constitution shall be interpreted as to limit or impede the rights of the Commission to access and examine such confidential information of the Exchange pursuant to the U.S. federal securities laws and the rules thereunder, or to limit or impede the ability of a Governor, the Exchange and its personnel to disclose such confidential information to the Commission.

H. Exchange Limited Liability Company Agreement

The Amended Exchange LLC Agreement, which was filed as part of this rule filing and is available on the Commission's website, will become effective upon the closing of the Transaction. Among other things, the Amended Exchange LLC Agreement will establish the rights and obligations of MC and MC Acquisition Sub as equity owners of the Exchange and vest the Exchange Board of Governors with its management powers.

(i) Distribution⁴⁰

The Amended Exchange LLC Agreement will provide that no distribution to MC and MC Acquisition Sub, as participants of the Exchange, shall include revenues received by the Exchange from regulatory fines, fees or penalties. The purpose of this provision is to ensure that the regulatory authority of the Exchange is not used improperly to benefit the holders of the Exchange's LLC interests.

⁴⁰ See Article IV, Section 4.6 of the Amended Exchange LLC Agreement.

(ii) Indemnification⁴¹

The Amended Exchange LLC Agreement will also provide that the Exchange will indemnify the Governors, officers, committee members, employees and agents of the Exchange to the fullest extent permitted by law, as well as the interestholders of the Exchange and their respective directors, officers, committee members, employees and agents, if any such person acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Exchange and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful. The plea of nolo contendere or its equivalent shall not, of itself, create a presumption that such person did not act in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interests of the Exchange, and, with respect to any criminal action of proceeding, had reasonable cause to believe that his or her conduct was unlawful.

The personal liability of the Governors of the Exchange will be eliminated to the fullest extent permitted by the General Corporation Law of the State of Delaware, as the same exists or may hereafter be amended.⁴² No amendment or repeal of Section 6.6 of the Amended Exchange LLC Agreement shall apply to or have any effect on the liability or alleged liability of any Governor of the Exchange for or with respect to any act or omission on the part of such Governor occurring prior to such amendment or repeal.⁴³

⁴¹ See Article VI of the Amended Exchange LLC Agreement.

⁴² See Article VI, Section 6.6 (Fiduciary Duty) of the Amended Exchange LLC Agreement.

⁴³ Id.

In furtherance of this indemnification obligation, the Amended Exchange LLC Agreement will provide that the Exchange may purchase and maintain insurance on behalf of certain persons whether or not the Exchange would have the power to indemnify those persons pursuant to the Amended Exchange LLC Agreement. Moreover, the Amended Exchange LLC Agreement will require the Exchange to cause MC and the MC Acquisition Sub to be covered under the Exchange's insurance policies to the same extent as the Governors, officers, committee members, employees and agents of the Exchange. Such insurance policies must insure against at least matters relating to or arising from the Transaction.

(iii) Amendment⁴⁴

Any amendment to or repeal of any provision of the Amended Exchange LLC Agreement shall not be effective until the same is filed with or filed with and approved by the Commission, under Section 19 of the Act⁴⁵ and the rules promulgated thereunder, as the case may be.

(iv) Direct Transfer of Ownership Interests in the Exchange⁴⁶

Under the Amended Exchange LLC Agreement, any sale, issuance, transfer or other disposition in any single transaction or series of transactions of (A) any limited liability company interests or other equity security of the Exchange or any securities convertible into or exchangeable for, or options rights or warrants to acquire, any such equity securities or (B) any notes or debt securities containing equity features (including,

⁴⁴ See Article XI, Section 11.3 of the Amended Exchange LLC Agreement.

⁴⁵ 15 U.S.C. 78s.

⁴⁶ See Article IX, Section 9.3 of the Amended Exchange LLC Agreement.

without limitation, any notes or debt securities convertible into or exchangeable for any equity securities or containing profit participation features) shall: (i) be made only in compliance with the member vote procedures set forth in Section 7(a) of the Second Restated Certificate of Incorporation of MC; and (ii) be subject to prior approval by the Commission pursuant to the rule filing procedure under Section 19 of the Act,⁴⁷ and the rules promulgated thereunder. Any attempt to issue or transfer any such equity interests or any rights thereunder in violation of the preceding sentence shall be null and void ab initio. The purpose of this provision is to provide the Commission with the ability to review and subject to public notice and comment the transfer of any ownership interests of the Exchange.

I. Second Restated MC Certificate of Incorporation

MC will adopt a Second Restated MC Certificate of Incorporation upon the closing of the Transaction, which was filed as part of this rule filing and is available on the Commission's website.

(i) Purpose⁴⁸

Under the Second Restated MC Certificate of Incorporation, the purposes of MC continue to be: (i) directly or indirectly holding, acquiring, exchanging, or disposing of equity or other interests in the Exchange and exercising the rights incident to its ownership; and (ii) to conduct and carry on only activities incidental to and in furtherance of the foregoing which may lawfully be conducted and carried on by a corporation of its type formed under the New York Not-for-Profit Corporation Law.

⁴⁷ 15 U.S.C. 78s.

⁴⁸ See Section 3 of the Second Restated MC Certificate of Incorporation.

(ii) Required Consents⁴⁹

The Exchange will be required to obtain MC's consent prior to (i) the authorization, issuance or grant of any new trading rights on the Exchange, and (ii) the sale, issuance, transfer or other disposition in a single transaction or series of transactions of any equity security of the Exchange, or any notes or debt securities of the Exchange containing equity features. With respect to such matters, promptly upon receiving a written request from the Exchange, the Secretary of MC will call a meeting of the holders of the memberships entitled to vote thereat to vote on the matter. If the required number of memberships are voted in favor of authorizing such matter, the proper officers of MC shall promptly grant the MC's consent to the Exchange. Any such consent shall be granted by MC only upon the affirmative vote of a majority of the regular memberships and the options principal memberships voted (as a single class) at a meeting duly called and convened and at which a quorum is present. If a proposed matter is not approved at the duly convened meeting convened with respect thereto, the request for such matter shall not be submitted again to the membership for a period of ninety days.⁵⁰

MC will be required to obtain the consent of the majority of the memberships entitled to vote in order for it to transfer, sell or otherwise dispose of its or an affiliate's interest in the Exchange. If such matter is not approved at the duly convened meeting convened with respect thereto, the request for such matter shall not be submitted again to the membership for a period of ninety days.⁵¹

⁴⁹ See Section 7(a) and 7(b) of the Second Restated MC Certificate of Incorporation.

⁵⁰ See Section 7(a) of the Second Restated MC Certificate of Incorporation.

⁵¹ See Section 7(b) of the Second Restated MC Certificate of Incorporation.

(iii) Indirect Transfer of Ownership Interests in the Exchange⁵²

Under the Second Restated MC Certificate of Incorporation, any sale, issuance, transfer or other disposition in any single transaction or series of transactions of (A) any equity securities of MC or MC Sub, or any securities convertible into or exchangeable for, or options rights or warrants to acquire, any such equity securities, or (B) any notes or debt securities containing equity features (including, without limitation, any notes or debt securities convertible into or exchangeable for any equity securities or containing profit participation features) shall be subject to prior approval by the Commission pursuant to the rule filing procedure under Section 19 of the Act⁵³ and the rules promulgated thereunder; provided that the foregoing shall not apply to any sale, transfer or other disposition of seats or membership interests of the MC. Any attempt to issue or transfer such equity interest or any rights thereunder in violation of the preceding sentence shall be null and void ab initio. The purpose of this provision is to provide the Commission the authority to review and subject to public notice and comment any transfer of indirect ownership interests in the Exchange other than the transfer of membership interests.

(iv) Issuance of Additional Memberships

Upon receiving a written request from the Exchange for an amendment to the Second Restated MC Certificate of Incorporation to authorize the issuance of additional memberships of any class, the Secretary of MC shall call a meeting of the holders of memberships entitled to vote thereat to vote on such request in accordance with the

⁵² See Section 7(c) of the Second Restated MC Certificate of Incorporation.

⁵³ 15 U.S.C. 78s.

Amended MC By-Laws. Such an amendment may be authorized, and such additional memberships may be issued, only upon the affirmative vote of a majority of the regular memberships and the options principal memberships voted (as a single class) at a duly convened meeting.⁵⁴

(v) Elections

The Members will have the right to elect any Governors, Council Members and Trustees that MC, as the Class A Interestholder, is entitled to vote upon in accordance with the amended Exchange Constitution and in accordance with the procedures set forth in the Amended MC By-Laws.⁵⁵

(vi) Indemnification⁵⁶

The Second Restated MC Certificate of Incorporation will also provide limitation of liability and indemnification for MC directors and officers. Under the Second Restated MC Certificate of Incorporation, MC will to the fullest extent permitted by law, indemnify any person who is or was made, or threatened to be made, a party to any threatened, pending or completed, action, suit or proceeding, whether civil, criminal, administrative or investigative, including, without limitation, an action by or in the right of MC to procure a judgment in its favor, by reason of the fact that such person, or a person of whom such person is the legal representative, is or was a director or officer of MC, or is or was serving in any capacity at the request of MC for any other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise, against

⁵⁴ See Section 9 of the Second Restated MC Certificate of Incorporation.

⁵⁵ See Section 8 of the Second Restated MC Certificate of Incorporation.

⁵⁶ See Section 11 of the Second Restated MC Certificate of Incorporation.

judgments, fines, penalties, excise taxes, amounts paid in settlement (with the written consent of MC which shall not be unreasonably withheld) and costs, charges and expenses (including attorneys' fees and disbursements). Notwithstanding the foregoing, no indemnification shall be provided to or on behalf of any director or officer if a judgment or other final adjudication adverse to such director or officer establishes that (i) his or her acts were committed in bad faith or were the result of active and deliberate dishonesty and, in either case, were material to the cause of action so adjudicated, (ii) he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled or (iii) his or her acts violated Section 719 of the New York Not-for-Profit Corporation Law. MC will have the power to purchase insurance for its officers and directors.

(vii) Books and Records⁵⁷

MC shall keep at the office of MC or such other locations within the United States as may from time to time be designated by the Board of Directors correct and complete books and records of account and minutes of the proceedings of its Members, Board of Directors and committees, if any, and a list of the names, addresses, and classes of membership of the Members. Any of the foregoing books, minutes and records may be in written form or in any other form capable of being converted into written form within a reasonable time. To the extent that the foregoing books, minutes and records are related to the activities of the Exchange, such books, minutes and records shall be deemed to be the books, minutes and records of the Exchange for the purposes of Section 17(b) of the

⁵⁷ See Section 12 of the Second Restated MC Certificate of Incorporation.

Act,⁵⁸ and shall be subject at all times to inspection and copying by the Commission and the Exchange. The Exchange believes that such provision would provide the Commission and the Exchange with the authority to inspect and copy the books, records and minutes of MC relating to the activities of the Exchange and therefore help the Commission and the Exchange carry out their regulatory responsibilities.

(viii) Officers and Directors⁵⁹

With respect to conduct by the officers and directors of MC that relates to the activities of the Exchange, such officers and directors shall be deemed to be the officers and directors of the Exchange solely for the purposes of the removal and censure authority of the Commission pursuant to Section 19(h)(4) of the Act.⁶⁰

For so long as MC shall control, directly or indirectly, the Exchange, each officer, director and employee of MC shall give due regard to the preservation of the independence of the self-regulatory function of the Exchange and to the Exchange's obligations under the Act, and the rules thereunder, including, without limitation, Section 6(b) of the Act,⁶¹ and shall not take any actions which he or she knows or reasonably should have known would interfere with the effectuation of any decisions by the Board of Governors of the Exchange relating to its regulatory functions (including disciplinary matters) or which would adversely affect the ability of the Exchange to carry out its responsibilities under the Act.

⁵⁸ 15 U.S.C. 78q(b).

⁵⁹ See Section 13 of the Second Restated MC Certificate of Incorporation.

⁶⁰ 15 U.S.C. 78s(h)(4).

⁶¹ 15 U.S.C. 78f(b).

(ix) Consent to Jurisdiction⁶²

For so long as MC shall control, directly or indirectly, the Exchange, MC shall, and its officers, directors and employees by virtue of their acceptance of such position shall be deemed to, irrevocably submit to the exclusive jurisdiction of the United States federal courts, the Commission, and the Exchange, for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws, and the rules or regulations thereunder, arising out of, or relating to the activities of the Exchange, and MC shall, and by virtue of their acceptance of any such position, the officers, directors and employees of MC shall be deemed to, waive and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission as to such matters, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter thereof may not be enforced in or by such courts or agency.

(x) Cooperation with the Commission⁶³

For so long as MC shall control, directly or indirectly, the Exchange, MC shall, and the officers, directors and employees of MC by virtue of their acceptance of such position shall be deemed to, agree to cooperate with the Commission and the Exchange, in respect of said Commission's oversight responsibilities regarding the Exchange and the self-regulatory functions and responsibilities of the Exchange. MC shall take reasonable steps to ensure that its agents similarly cooperate with the Commission.

⁶² See Section 14 of the Second Restated MC Certificate of Incorporation.

⁶³ See Section 15 of the Second Restated MC Certificate of Incorporation.

(xi) Confidential Information⁶⁴

All confidential information of the Exchange pertaining to the self regulatory function of the Exchange, including books, minutes and records of the Exchange reflecting such confidential information (including but not limited to regulatory investigations, examinations, disciplinary matters, and to the extent designated by the Exchange as confidential, trading data and practices) which shall come into the possession of MC, the officers, directors, employees or agents of MC, shall be retained in confidence by MC and the officers, directors, employees and agents of MC and shall not be used for any non-regulatory purposes. MC shall take reasonable steps to ensure that its agents will comply with this section. The purpose of this provision is to help ensure that confidential information relating to the Exchange's self-regulatory function is accorded appropriate confidential treatment and is not misused.

Nothing in the Second Restated Certificate of Incorporation shall be interpreted as to limit or impede the rights of the Commission or the Exchange to access and examine such confidential information pursuant to the U.S. federal securities laws and the rules thereunder, or to limit or impede the ability of MC and the officers, directors, employees or agents of MC to disclose such confidential information to the Commission or the Exchange.

(xii) Further Compliance⁶⁵

MC shall take reasonable steps to ensure that its officers, directors and employees comply with Sections 12, 13, 14, 15 and 16 of the Second Restated MC Certificate of

⁶⁴ See Section 16 of the Second Restated MC Certificate of Incorporation.

⁶⁵ See Section 17 of the Second Restated MC Certificate of Incorporation.

Incorporation, which shall include obtaining a written agreement from such individuals, as a condition to their initial or continued employment or service as a director, that they will comply with or consent to, as the case may be, such provisions.

The purpose of the provisions set forth above in paragraphs (vii)-(xii) of this section is to assist both the Exchange and the Commission in exercising their respective regulatory oversight responsibilities over the affairs of the Exchange by, among other things, providing access to books and records relating to the Exchange and ensuring that the officers, directors and employees of MC are aware of and take into account such responsibilities and cooperate with the Commission in connection therewith.

(xiii) Amendment⁶⁶

Under the Second Restated MC Certificate of Incorporation, for so long as MC controls, directly or indirectly, the Exchange, before any change or addition to the Second Restated Certificate of Incorporation or By-laws of MC shall be effective, the same shall be submitted to the Board of Governors of the Exchange and if said Board shall determine that the same constitutes a “rule of an exchange” as such term is defined in the Act and the rules promulgated thereunder, and must be filed with or filed with and approved by the Commission before the same may be effective, under Section 19 of the Act,⁶⁷ and the rules promulgated thereunder, then the same shall not be effective until filed with or filed with and approved by the Commission, as the case may be. The Exchange believes that this provision would provide the Exchange, and the Commission (if applicable) the authority to review any amendment to the Second Restated Certificate

⁶⁶ See Section 18 of the Second Restated MC Certificate of Incorporation.

⁶⁷ 15 U.S.C. 78s.

of Incorporation of MC or its By-laws prior to its effectiveness in order to help the Exchange and Commission carry out their respective regulatory responsibilities.

J. Amended MC By-Laws

The Amended MC By-Laws will become effective upon the closing of the Transaction. The Amended MC By-laws were filed as part of the rule filing and is available on the Commission's website.

(i) MC Board of Directors

Under the Amended MC By-laws, at the next regular meeting for the election of directors after the closing of the Transaction, the Members will elect five directors in accordance with the Amended MC By-Laws.

The MC Board of Directors will be elected for one-year terms and will hold office until their successors are elected. No director of MC who has served eight consecutive elected terms as a director will be eligible for election as a director of MC except after an interval of two years; provided, however, that service on the Board of Directors prior to January 1, 1999 will not be taken into account for these purposes.⁶⁸ Unless otherwise required, each matter shall be decided by a vote of a majority of the directors present at the time of the vote, provided a quorum is present.⁶⁹

Vacancies on the MC Board of Directors may be filled for the remaining term of such vacant position by a majority vote of all remaining MC Directors.⁷⁰ The Amended

⁶⁸ See Article II, Section 2.03 of the Amended MC By-Laws.

⁶⁹ See Article II, Section 2.13 of the Amended MC By-Laws.

⁷⁰ See Article II, Section 2.06 of the Amended MC By-Laws.

MC By-Laws will also provide limitation of liability and indemnification for MC directors and officers.⁷¹

(ii) MC Nominating Committee⁷²

Under the Amended MC By-laws, the MC Nominating Committee will be appointed by the MC Board of Directors and will consist of two or three Directors. The MC Nominating Committee will: (i) establish criteria and procedures for the nomination of MC Directors; (ii) search for qualified nominees for submission to the Members for election; (iii) review the qualifications of and, when necessary and appropriate, interview candidates who may be proposed for nomination as MC directors; (iv) submit to the Members a list of nominees for the election of MC directors; (v) perform any and all other duties in connection with the selection, election or termination of the MC directors as the MC Board of Directors may request; and (vi) make periodic reports to the entire Board of Directors on such matters within the Committee's powers and responsibilities as the Board of Directors may specify. Any vacancy in the MC Nominating Committee will be filled by the Committee's remaining members, who will elect a Director qualified to fill the vacancy.

(iii) Nomination and Election Procedures⁷³

Under the Amended MC By-laws, all candidates to be submitted to the Members for election as directors will be selected by either (i) the MC Nominating Committee or (ii) by petition of the Members to the MC Nominating Committee.

⁷¹ See Article VIII of the Amended MC By-Laws.

⁷² See Article III, Section 3.03 of the Amended MC By-Laws.

⁷³ See Article I, Sections 1.13 and 1.14 of the Amended MC By-Laws.

The Members may propose nominees for directors of MC for consideration by the MC Nominating Committee by written submission filed with the Secretary of MC for delivery to the MC Nominating Committee not less than 12 weeks prior to the annual meeting of the Members. The eligibility of any candidate proposed in any such submission will be determined by the MC Nominating Committee in its sole discretion and without the right of appeal.

The MC Nominating Committee will report to MC at least eight weeks prior to the date of the annual meeting of the Members the names of candidates nominated by it as directors. Such report will be promptly disseminated or made available to Members by posting or other appropriate means and will be promptly forwarded to the Secretary of MC for mailing to the Members in accordance with the Amended MC By-Laws.

The Members may nominate candidates for directors of MC by written petition filed with the Secretary of MC for delivery to the MC Nominating Committee within three weeks after the dissemination of the report of the MC Nominating Committee. The eligibility of any candidate nominated in any such petition will be determined by the MC Nominating Committee. A statement of the candidates nominated by petition will be promptly disseminated or made available to Members by posting or other appropriate means and will be promptly forwarded to the Secretary of MC for mailing to the Members within three days after the dissemination in accordance with the Amended MC By-Laws.

The time periods set forth above may be equitably adjusted by the MC Nominating Committee with respect to the first election of directors occurring following

April 1, 2004, to facilitate a prompt initial election; provided, however, in no event shall the petition period described in the preceding paragraph be less than 10 business days.

Any person nominated by the MC Nominating Committee or by petition, whether or not such person is a Member, may be eligible to be elected to the MC Board of Directors. The Amended MC By-laws also includes the nomination procedures for Governors, Council Members and Trustees of the Exchange as described in Section II.A.1.G.(ii) of this Notice.⁷⁴

(iv) Elections⁷⁵

Under the Amended MC By-laws, unless otherwise required by the New York Not-for-Profit Corporation Law, by the MC Certificate of Incorporation or by the second sentence of this paragraph, all matters submitted to a vote of the Members shall be decided by the vote of a majority of the Members entitled to vote and present in person or by proxy at the meeting. At each meeting of the Members for the election of directors of MC, Governors of the Exchange, Trustees, and Council Members, such persons shall be elected by a plurality of votes cast, in person or by proxy, at such meeting by the regular and options principal members voting together as a single class and MC, as the holder of the Class A Interest of the Exchange, shall vote such Class A Interest so as to cause the election of such persons who have been so elected by the regular and options principal members.

⁷⁴ See Section 1.14 of the Amended MC By-Laws.

⁷⁵ See Article I, Sections 1.10 and 1.11 of the Amended MC By-Laws.

(v) Books and Records⁷⁶

Under the Amended MC By-laws, MC shall keep at the office of MC or such other locations within the United States as may from time to time be designated by the Board of Directors correct and complete books and records of account and minutes of the proceedings of its Members, Board of Directors and committees, if any, and a list of the names, addresses and classes of membership of the Members. Any of the foregoing books, minutes and records may be in written form or in any other form capable of being converted into written form within a reasonable time. To the extent that the foregoing books, minutes and records are related to the activities of the Exchange, such books, minutes and records shall be deemed to be the books, minutes and records of the Exchange for the purposes of Section 17(b) of the Act,⁷⁷ and shall be subject at all times to inspection and copying by the Commission and the Exchange.

(vi) Officers and Directors⁷⁸

Under the Amended MC By-laws, with respect to conduct by the officers and directors of MC that relates to the activities of Amex, such officers and directors shall be deemed to be the officers and directors of the Exchange solely for the purposes of the removal and censure authority of the Commission pursuant to Section 19(h)(4) of the Act.⁷⁹ For so long as MC shall control, directly or indirectly, the Exchange, each officer, director and employee of MC shall give due regard to the preservation of the

⁷⁶ See Article VI, Section 6.02 of the Amended MC By-Laws.

⁷⁷ 15 U.S.C. 78q(b).

⁷⁸ See Section 7.05 of the Amended MC By-Laws.

⁷⁹ 15 U.S.C. 78s(h)(4).

independence of the self-regulatory function of the Exchange and to the Exchange's obligations under the Act and the rules thereunder, including, without limitation, Section 6(b) of such Act,⁸⁰ and shall not take any actions which he or she knows or reasonably should have known would interfere with the effectuation of any decisions by the Board of Governors of the Exchange relating to its regulatory functions (including disciplinary matters) or which would adversely affect the ability of the Exchange to carry out its responsibilities under the Act.

(vii) Consent to Jurisdiction⁸¹

For so long as MC shall control, directly or indirectly, the Exchange, MC shall, and its officers, directors and employees by virtue of their acceptance of such position shall be deemed to, irrevocably submit to the exclusive jurisdiction of the United States federal courts, the Commission, and the Exchange, for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws, and the rules or regulations thereunder, arising out of, or relating to the activities of the Exchange, and MC shall, and by virtue of their acceptance of any such position, the officers, directors and employees of MC shall be deemed to, waive and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission as to such matters, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter thereof may not be enforced in or by such courts or agency.

⁸⁰ 15 U.S.C. 78f(b).

⁸¹ See Section 7.06 of the Amended MC By-Laws.

(viii) Cooperation with the Commission⁸²

For so long as MC shall control, directly or indirectly, the Exchange, MC shall, and the officers, directors and employees of MC by virtue of their acceptance of such position shall be deemed to, agree to cooperate with the Commission and the Exchange in respect of said Commission's oversight responsibilities regarding the Exchange and the self-regulatory functions and responsibilities of the Exchange. MC shall take reasonable steps to ensure that its agents similarly cooperate with the Commission.

(ix) Confidential Information⁸³

All confidential information of the Exchange pertaining to the self-regulatory function of the Exchange, including books, minutes and records of the Exchange reflecting such confidential information (including but not limited to regulatory investigations, examinations, disciplinary matters, and to the extent designated by the Exchange as confidential, trading data and practices) which shall come into the possession of MC, the officers, directors, employees or agents of MC, shall be retained in confidence by MC and the officers, directors, employees and agents of MC and shall not be used for any non-regulatory purposes. MC will take reasonable steps to ensure that its agents will comply with this section. The purpose of this provision is to help ensure that confidential information relating to the Exchange's self-regulatory function is accorded appropriate confidential treatment and is not misused.

Nothing in the Amended MC By-laws shall be interpreted as to limit or impede the rights of the Commission or the Exchange to access and examine such confidential

⁸² See Section 7.07 of the Amended MC By-Laws.

⁸³ See Section 7.08 of the Amended MC By-Laws.

information pursuant to the U.S. federal securities laws and the rules thereunder, or to limit or impede the ability of MC, officers, directors, employees or agents of MC to disclose such confidential information to the Commission or the Exchange.

(x) Further Compliance⁸⁴

MC will take reasonable steps to ensure that its officers, directors and employees comply with Sections 6.02, 7.05, 7.06, 7.07 and 7.08 of the Amended MC By-Laws, which shall include obtaining a written agreement from such individuals, as a condition to their initial or continued employment or service as a director, that they will comply with or consent to, as the case may be, such provisions.

The purpose of the provisions set forth above in paragraphs (v)-(x) of this section is to assist both the Exchange and the Commission in exercising their respective regulatory oversight responsibilities over the affairs of the Exchange by, among other things, providing access to the books and records relating to the Exchange and ensuring that the officers, directors and employees of MC are aware of and take into account such responsibilities and cooperate with the Commission in connection therewith.

(xi) Amendment⁸⁵

Under the Amended MC By-laws, for so long as MC controls, directly or indirectly, the Exchange, before any change or addition to the By-Laws of MC shall be effective, the same shall be submitted to the Board of Governors of the Exchange and if said Board shall determine that the same constitutes a “rule of an exchange” as such term is defined in the Act, and the rules promulgated thereunder and must be filed with or filed

⁸⁴ See Section 7.09 of the Amended MC By-Laws.

⁸⁵ See Section 9.01 of the Amended MC By-Laws.

with and approved by the Commission before the same may be effective, under Section 19 of the Act,⁸⁶ and the rules promulgated thereunder, then the same shall not be effective until filed with or filed with and approved by the Commission, as the case may be. The Exchange believes that this provision would provide the Exchange, and the Commission (if applicable), the ability to review any amendment to the Amended MC By-laws prior to their being effective in order to help the Exchange and Commission to effectively carry out their respective regulatory responsibilities.

K. Transparency

In connection with the Transaction, both the Exchange and MC will adopt resolutions providing for greater transparency of their respective operations. Prior to each annual meeting at which directors or Governors, as the case may be, are elected, each company will distribute a proxy statement disclosing certain matters regarding each of the respective Board's activities for the preceding year, pertinent information about the independence of Governors and directors and compensation data for the Governors and five most highly compensated officers of the Exchange.

2. Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act⁸⁷ in general and furthers the objectives of Section 6(b)(3)⁸⁸ in particular in that the proposed amendments to the Exchange Constitution are designed to assure a fair representation of its Members in the selection of its directors and

⁸⁶ 15 U.S.C. 78s.

⁸⁷ 15 U.S.C. 78f(b).

⁸⁸ 15 U.S.C. 78f(b)(3).

administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a Member of the Exchange, broker, or dealer. The current Constitution of the Exchange is being amended to institute new governance structures for the Exchange. As stated previously, the proposed governance structure for the Exchange provides for a Board of Governors selected directly by its Members, who will also have the opportunity to vote on a “pass-through” basis on certain significant matters involving the Exchange, including the sale, issuance, transfer or other disposition of any equity security of the Exchange or of any notes or debt securities of the Exchange containing equity features or the issuance of any new trading rights by the Exchange. Under the new governance structure, among the six Industry Governors of the Exchange, two will be the Floor Governors; one will be the Membership Governor; one will be the Upstairs Governor; one will be the Listed Governor; and one will be the Management Governor. The Exchange believes that the proposed changes will assure a balanced structure of the Exchange Board of Governors and fair representation of various constituencies on the Exchange Board of Governors.

The new governance provisions will also provide that the Exchange Board of Governors will be largely independent and will have board committees composed primarily of independent Governors with substantial authority over compensation, audit, regulatory and corporate governance matters, as well as the nomination of Governors to serve on the Exchange Board of Governors. As a result, the Exchange believes that these proposed amendments to the Exchange Constitution are consistent with the objectives of Section 6(b)(5)⁸⁹ in that they are designed to prevent fraudulent and manipulative acts

⁸⁹ 15 U.S.C. 78f(b)(5).

and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaging 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; and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange also believes that the proposed amendments to the Exchange Constitution are consistent with Section 6(b)(8) of the Act⁹⁰ which requires that the rules of the Exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. With a new capital and governance structure, the Exchange will be better positioned to improve its technology and engage in value-enhancing transactions designed to facilitate its long-term success.

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

The proposed rule change will impose no burden on competition 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

By letter dated April 15, 2004, counsel for the Amex Seat Owners Association ("ASOA") submitted written comments on a draft of the rule filing that was proposed to be transmitted to the Commission, which contained many of the same provisions as are contained in the current rule filing. ASOA objected to certain of such provisions, including: (a) the filing of the MC corporate governance documents as part of the Exchange's rule filing and (b) the determination by the Exchange Board of Governors as

⁹⁰ 15 U.S.C. 78f(b)(8).

to whether an amendment to such MC governance documents would require a subsequent rule filing. The April 15 ASOA letter also raised certain questions regarding ambiguities in certain language contained in the rule filing, which have been clarified. By letter dated June 9, 2004, counsel for ASOA submitted additional comments on the then-current draft rule filing, which raised the following additional concerns: (a) the excessive scope of the responsibilities and liabilities of MC directors and officers for matters relating to the Exchange; and (b) the breadth of MC's obligations with regard to books and records that relate to the activities of the Exchange. The concerns raised by the ASOA letters were discussed with the Commission staff on several occasions, and the forms of the MC corporate governance documents attached as Exhibits to the Exchange's 19b-4 filing (which contain substantially similar provisions as those on which ASOA commented) reflect the outcome of those discussions.

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 self-regulatory organization 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.

In July 2004, the Board of Governors of the Exchange will consider approval of the final forms of the Exchange and MC governance documents, including the Exchange Constitution. The Exchange hereby consents to extension of the period of time specified

in Section 19(b)(2) of the Act⁹¹ until at least thirty-five days after the Exchange files an appropriate amendment to this filing setting forth the completion of all additional action required with respect to this proposed rule change.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the 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. Please include File Number SR-Amex-2004-50 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 Number SR-Amex-2004-50. 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

⁹¹ 15 U.S.C. 78s(b)(2).

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 Number SR-Amex-2004-50 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.⁹²

Margaret H. McFarland
Deputy Secretary

⁹² 17 CFR 200.30-3(a)(12).