

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51900; File No. SR-Amex-2005-003)

June 22, 2005

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change, and Amendment No. 1 Thereto, to Expand the Types of Trusts Permitted to Directly Own Amex Memberships

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 7, 2005, the American Stock Exchange LLC (“Amex” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by Amex. On June 7, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange proposes to amend Amex Rule 356 to expand the types of trusts permitted to directly own Amex memberships.

Below is the amended text of the proposed rule change. Proposed new language is in *italics*; proposed deletions are in [brackets].

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, the Exchange revised the proposed rule text to clarify that an Exchange member owner who does not conduct broker-dealer activities on the floor of the Exchange is not required to be registered with the Commission as a broker-dealer. Member owners can be individuals, partnerships, corporations, custodial accounts or grantor trusts. Amendment No. 1 replaced and superseded the original filing in its entirety.

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D. Office Rules

Section 4. Employees and Admission of Members and Member Organizations

Rule 356. Member Organizations

Requirements

For information regarding admission of an organization as a member organization, refer to Article IV, Section 2 of the Exchange Constitution and Exchange Rules 300-312 and contact Membership Services where a checklist of applicable requirements is available.

Partnership

A firm applying to become a member organization must submit executed copies of the partnership agreement and all amendments thereto; if applicable, an executed copy of the certificate of limited partnership, as certified by the County Clerk or a copy of the certificate of authority for limited partnerships organized outside New York State; and all documents and information otherwise required by the Exchange. See Exchange Rules 300 and 302 for provisions to be included in the partnership agreement.

All general partners of such firm must become members or allied members of the Exchange. Any limited partners of such firm who control the firm must become approved persons of the Exchange.

Corporation

A corporation seeking to become a member organization must submit an executed copy of the charter or certificate of incorporation and all amendments thereto, certified by the Secretary of State; an executed copy of the by-laws and all amendments thereto certified by the Secretary of the corporation or other executive officer; forms of stock certificates; certified list of officers, directors and stockholders pursuant to Exchange Rule 310; and all documents and information

otherwise required by the Exchange. See Exchange Rule 312 for provisions to be included in the certificate of incorporation and legend on the stock certificates.

In addition, the Board of Directors of such corporation must designate its “principal executive officers” who shall be members or allied members and shall exercise senior principal executive responsibility over the various areas of the business of such corporation in such areas as the rules of the Exchange may prescribe, including: operations, compliance with rules and regulations of regulatory bodies, finance and credit sales, underwriting, research and administration. Any shareholder of such corporation who controls the corporation must become an approved person of the Exchange.

Trusts

Custodial Accounts

A pension plan seeking to become a member organization must establish that its sponsor is either an active member, or where the sponsor is a member organization, that at least fifty percent of the pension plan’s participants are active members or the Floor employees of the sponsor. The pension plan must designate its trustee to represent it with respect to its membership, must ensure that its trustee is an allied member or approved person, as the case may be, and must ensure that every party required by the Exchange to be an approved person of the pension plan has qualified as such.

A pension plan seeking to become a member organization must agree that:

(i) the pension plan and related trust take the membership subject to the Constitution and Rules of the Exchange; (ii) the interests in the membership that inure to the participants of the pension plan and their beneficiaries shall be subject to the Constitution and Rules of the Exchange, and subject to any agreements made by the

trustee in connection with the membership, including, without limitation, any agreements made in connection with qualification of a member organization with respect to the membership or any special transfer agreement made in connection with a lease of the membership; (iii) the membership cannot be encumbered and the trustee cannot pledge the membership, nor create or permit to be created thereon any lien, charge or other encumbrance; (iv) all controversies arising in connection with the membership, including controversies with the lessee or nominee thereof, shall be subject to arbitration pursuant to the Constitution and Rules of the Exchange; (v) the trustee shall have all necessary powers to act in connection with the membership; (vi) the Exchange shall have no liability to the participants in the pension plan and their beneficiaries in the event the purchase, operation or disposition of the Exchange membership results in loss to the pension plan and related trust (The plan sponsor and trustee each shall indemnify and hold the Exchange harmless from all claims, losses, expenses (including all attorney's fees) and taxes arising out of the purchase, operation and disposition of the Exchange membership); (vii) the plan sponsor and trustee have been advised by their legal counsel as to the requirements of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the Internal Revenue Code of 1986, as amended (the "Code") with respect to the trust's purchase, operation and disposition of an Exchange membership and any income earned by the trust from the membership; (viii) the plan sponsor is either: (a) an active member of the Exchange, or (b) if the plan sponsor is a member organization, at least fifty percent of the pension plan's participants are active members of the Exchange or Floor employees of the plan sponsor; (ix) the plan sponsor has designated the plan trustee to represent the trust in all dealings with the Exchange

with respect to the membership; (x) the trustee and every party required by the Exchange to become an allied member or approved person of the Exchange will qualify as such; (xi) the decision to invest assets of the trust in an Exchange membership was made by fiduciaries of the pension plan independent of the Exchange and its officers and employees and such fiduciaries have not relied on any advice or recommendation of the Exchange or any of its officers and employees, and with regard to ERISA, tax and other legal considerations related to the membership, the plan sponsor and the trustee have relied exclusively on the advice of their own professional advisors; (xii) the trust has the financial ability to bear the economic risk of an investment in an Exchange membership, has adequate means for providing for current benefit needs and has no need for liquidity with respect to the sale or other transfer of the membership; (xiii) the plan sponsor and the trustee are aware that an investment in an Exchange membership involves substantial risks and they have determined that a membership is a suitable investment for the trust and that the trust could bear a loss that would exceed its investment in the membership; and (xiv) the trust associated with the pension plan is exempt from federal income taxes under either Section 501(a) or 408(e) of the Internal Revenue Code of 1986, as amended.

In addition, the trustee must submit to the Exchange a legal opinion in form and substance and from counsel satisfactory to the Exchange as to the following: (a) that the pension plan and related trust were validly created and have not been terminated; and that any amendments have been validly adopted; (b) that the trust is authorized to own an Exchange membership; (c) that the trustee has authority on behalf of the trust to enter into the agreement described in clauses (i) through (xiv) in the preceding paragraph, and that the representations and agreements by the trustee referred to in such agreement have been duly adopted and are binding on and enforceable

against the sponsoring employer, the trust and the participants in the pension plan; (d) that the trustee is authorized to either (i) appoint a nominee to engage in business on the Exchange in the name of the trust and be responsible for all transactions and obligations of the nominee, or (ii) lease the membership to the party to whom the membership will be leased; and (e) that the pension plan is described in either Section 401(a) or 408 of the Internal Revenue Code and the trust is tax exempt under either Section 501(a) or Section 408(e).

Grantor Trusts

(a) A trust may acquire one or more memberships, either by a transfer from an owner of a membership or a direct purchase.

(b) Prior to a trust becoming a member organization, the grantor (as defined below) and/or the trustee or trustees (hereinafter the “trustee”) on behalf of the trust, as the case may be, must agree that:

- (i) The membership owner transferring a membership in trust or the grantor of the trust purchasing a membership (in either case, the “grantor”), must during the grantor’s lifetime or existence be a beneficiary of the trust.
- (ii) The trustee, grantor and every party required by the Exchange to become an allied member or approved person of the Exchange will qualify as such.
- (iii) The trust takes the membership subject to the Constitution and Rules of the Exchange, and the grantor and trustee shall remain subject to the Constitution and Rules of the Exchange.
- (iv) The interests in the membership that inure to the grantor and the beneficiaries of the trust shall be subject to the Constitution and Rules of the Exchange, and subject to any agreements made by the trustee in connection with the

membership, including, without limitation, any agreements made in connection with qualification of a member organization with respect to the membership or an special transfer agreement made in connection with a lease of the membership.

- (v) The Exchange shall have no liability to the trustees of the trust or the beneficiaries of the trust in the event the purchase, operation or disposition of the Exchange membership results in loss to the trust. The grantor, individually, and the trustees, on behalf of the trust, shall indemnify and hold harmless the Exchange for all claims, losses, expenses (including all attorney's fees) and taxes arising out of the purchase, operation and disposition of the membership.
- (vi) The grantor and trustee have been advised by legal counsel with respect to the trust's purchase, operation and disposition of an Exchange membership and any income earned or loss incurred by the trust from the membership.
- (vii) The decision to invest assets of the trust in an Exchange membership and/or to continue to hold an Exchange membership was made by the trustees of the trust independent of the Exchange and its officers and employees and such trustees have not relied on any advice or recommendation of the Exchange or any of its officers and employees. With respect to tax and other legal considerations related to the investment in the membership, the grantor and the trustees have relied exclusively on the advice of their own professional advisors.
- (viii) A membership held in trust may be transferred during the lifetime or existence of the grantor or at the grantor's death or ceasing to exist in accordance with the provisions of Article IV, Section 4 of the Constitution and the Rules of the Exchange. Additionally, an Authorization to Sell may be granted with respect to

a membership held in trust, in which case the provisions of Article IV, Section 4 of the Constitution and the Rules of the Exchange shall be applicable.

- (ix) A membership held in trust may be transferred to the grantor, subject to the Constitution and Rules of the Exchange.
- (x) Distributions in accordance with paragraphs (viii) and (ix) of this Rule shall be subject to the Constitution and Rules of the Exchange, and subject to any agreements made by the trustees in connection with the membership, including, without limitation, any agreements made in connection with qualification of a member organization with respect to the membership or any special transfer agreement made in connection with a lease of the membership.
- (xi) The membership shall not be encumbered and the trustees shall not pledge the membership, nor create or permit to be created thereon any lien, charge or other encumbrance.
- (xii) All controversies arising in connection with the membership, including controversies with the lessee or nominee thereof, shall be subject to arbitration pursuant to the Constitution and Rules of the Exchange.
- (xiii) The trustees shall have all necessary powers to act in connection with the membership.
- (xiv) The trust shall have (a) the financial ability to bear the economic risk of an investment in a membership, and (b) no need for liquidity with respect to the sale or other transfer of the membership.
- (xv) The grantor and the trustees are aware that an investment in a membership involves substantial risks, and they have determined that a membership is a

suitable investment for the trust and that the trust could bear a loss that would exceed its investment in the membership.

(c) The grantor must submit to the Exchange, in a form and manner prescribed by the Exchange, (i) an application to transfer the membership into trust or to authorize the trust to purchase the membership; (ii) a copy of the trust agreement; (iii) the agreement specified in paragraph (b) of this Rule; (iv) a legal opinion that meets the requirements of paragraph (d) of this Rule; and (v) such other documents or information as the Exchange may require.

(d) The trustee must submit to the Exchange a legal opinion in form and substance and from counsel satisfactory to the Exchange as to the following: (a) that the trust was validly created and has not been terminated; (b) that the trust is authorized to own an Exchange membership; (c) that the trustees have authority on behalf of the trust to enter into the agreement described in paragraph (b) of this Rule; (d) that the representations and agreements made by the grantor and the trustees, referred to in such agreement and as required by this Rule, have been duly adopted and are binding and enforceable against the trust, trustees, grantor and beneficiaries of the trust; and (e) that the trustees are authorized either (1) to appoint a nominee to engage in business on the Exchange in the name of the trust and be responsible for all transactions and obligations of the nominee, or (2) to lease the membership to the party to whom the membership will be leased.

(e) After the transfer of a membership in trust or the purchase of a membership by a trust, as the case may be, has been approved by the Exchange, the grantor and trustees must promptly submit to the Exchange any amendments to the trust agreement and must promptly notify the Exchange in writing of any changes in the information set forth in the application to transfer the membership in trust or to authorize the trust to purchase the membership, any

changes in successor trustee, any release of the membership out of the trust, and any termination of the trust. In the event that the membership is released from the trust, the trust terminates, or the trust agreement is amended so that it no longer complies with the requirements of this Rule, the Exchange shall deem the membership to have reverted to the grantor to be held directly and not in trust.

All prospective member organizations must also submit a financial statement required by the Exchange Examinations Divisions; an executed copy of the Uniform Application for Broker Dealer Registration and any amendments thereto as filed with the SEC, together with a copy of the order of approval, if applicable; an opinion of counsel that the organization is duly organized in the state of its incorporation and either (1) authorized to engage in the business of buying and selling securities as a broker and dealer in the state of New York, if applicable, or (2) authorized to buy and sell seats on the American Stock Exchange LLC and to lease them out; an opinion of counsel to the effect that every person required to become an approved person pursuant to Article IV, Section 2(j) and Rule 310(a) has applied for approval by the Exchange as such; and a copy of offering circulars or private placement memoranda prepared by the organization for the purpose of raising capital and an opinion of counsel as required by Rule 312(b), if applicable.

The Exchange shall not approve an organization as a member organization unless every party required to be an allied member or approved person of the organization has qualified as such. See Article I, Section 3(c) and (g) for definitions of “allied member” and “approved persons.”

Except for Custodial Accounts, Grantor Trusts and other member organizations which own Exchange seats but do not conduct broker-dealer activities on the floor of the Exchange, [T]he Exchange shall not approve an organization as a member organization unless such

organization is registered with the SEC as a broker-dealer, and submits an executed agreement signed by an individual associated with the organization and authorized to act in this regard, that the organization is bound by and agrees to abide by the provisions of the Constitution of the Exchange as amended from time to time and by all rules and regulations, orders, directives and decisions adopted or made in accordance therewith.

An organization shall cease to be a member organization and shall dispose of its membership if it becomes subject to any “statutory disqualification” as defined in Section 3(a)(39) of the Securities Exchange Act of 1934.

Admissions Procedure

The steps followed in connection with an organization’s application for regular or options principal membership are enumerated in the beginning of this chapter. There is a minimum posting period of 7 days for member organizations or approved person applicants. Notice of proposed admission shall be posted on the Bulletin Board in the Exchange upon the submission, in proper form, of all required documents.

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

In its filing with the Commission, Amex included statements concerning the purpose of, and basis for, the proposed rule change, as amended, 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. Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

Currently, the Exchange permits certain pension trusts (generally comprised of trusts or custodial accounts, *i.e.* Keoghs and IRAs) to directly own Exchange memberships for investment purposes and either lease the seat or designate a nominee to operate the seat. The pension trust sponsor must be an active member of the Exchange or, in the case of a member organization, at least fifty percent (50%) of the pension trust beneficiaries must be active members or their Floor employees.

The Exchange is proposing to expand the types of trusts that are permitted to own Amex memberships to include grantor trusts. The Exchange believes that these trusts can be useful for estate planning purposes and can also provide certain tax benefits to the grantor. Such trusts would be able to acquire one or more memberships either by a transfer from an existing owner of a membership or by a direct purchase. The grantor of the trust (*i.e.*, either the member transferring a membership to a trust or the grantor of the trust purchasing a membership) would be required during the grantor's lifetime or existence (in the case of a non-natural person) to be a beneficiary of the trust. In the event that the trust terminates or is amended such that it no longer qualifies to own an Exchange membership, any memberships held by the trust will revert to the grantor.

As is the case with pension trusts, the trustee and grantor will be required on behalf of the trust to execute an agreement with the Exchange acknowledging that the trust will own the membership subject to the Exchange Constitution and Rules, as well as certain other limitations and indemnifications, and will also be required to provide a legal opinion confirming that the trust was validly created, is authorized to own a membership and that the trustee is vested with

all necessary authority to either appoint a nominee to operate the seat on behalf of the trust and/or lease the seat, as well as to enter into the requisite agreement. Additionally, the trustee and grantor will be required to become allied members or approved persons of the Exchange, as applicable.

The Exchange believes that permitting broader trust ownership of memberships will enable seat owners to take advantage of certain estate planning and tax benefits, and will also potentially provide increased access to capital. The Chicago Board Options Exchange permits trust seat ownership.⁴

2. Statutory Basis

Amex believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁶ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, protect investors and the public interest.

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

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

⁴ A reference in the proposed rule change that the Philadelphia Stock Exchange, Inc. permits trust seat ownership has not been included in this notice pursuant to a telephone conversation between Ivonne Natal, Associate General Counsel, Amex and Geraldine Idrizi, Attorney, Division of Market Regulation, Commission, on June 20, 2005.

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

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

Amex neither solicited nor received written comments with respect to the proposed rule change, as amended.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

- (a) by order approve such proposed rule change, as amended; or
- (b) institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

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-2005-003 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-Amex-2005-003. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of 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-2005-003 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.⁷

Jill M. Peterson
Assistant Secretary

⁷ 17 CFR 200.30-3(a)(12).