SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 24457; 813–170]

Bain Capital, Inc. and BCIP Associates II; Notice of Application

May 17, 2000.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of application for an order under sections 6(b) and 6(e) of the Investment Company Act of 1940 (''Act'') granting an exemption from all provisions of the Act except section 9, sections 17 (other than certain provisions of paragraphs (a), (d), (f), (g), and (j)) and 30 (other than certain provisions of paragraphs (a), (b), (e), and (h)), sections 36 through 53, and the rules and regulations under the Act.

SUMMARY OF APPLICATION: Applicants Bain Capital, Inc. (''Bain Capital'') and BCIP Associates II (the ''Initial Investment Entity'') request an exemption from various provisions of the Act for an ''employees' securities company'' within the meaning of section 2(a)(13) of the Act.

Filing Dates: The application was filed on May 29, 1997, and amended on May 12, 2000.

Hearing or Notification of Hearing: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on June 12, 2000, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES:

Secretary, SEC, 450 Fifth Street NW, Washington, DC 20549–0609.

Applicants, Two Copley Place, Boston, Massachusetts 02116.

FOR FURTHER INFORMATION CONTACT: Mary Kay Frech, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee by writing the SEC's Public Reference Branch at 450 Fifth Street NW, Washington, DC 20549–0102, or by telephone at (202) 942–8090.

Applicants' Representations

1. Bain Capital, A Delaware corporation, is a private equity investment firm. It manages private investment funds (the ''Bain Funds'') which are exempt from registration under the Act in reliance on sections 3(c)(1) and 3(c)(7) of the Act. Bain Capital is exempt from registration as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act'') in reliance upon section 203(b)(3) of the Advisers Act.

2. Applicants propose to offer various investment programs (''Investment Entities'') to Eligible Investors (as defined below) of Bain Capital and Bain Capital Holdings, LLC, a limited liability company which is being organized to carry on the business activities of Bain Capital and will be owned by key employees of Bain Capital (together with Bain Capital, the ''Company'').

The Initial Investment Entity has been established to enable Eligible Investors to participate in co-investment opportunities with the Bain Funds. The Initial Investment Entity is structured as a general partnership formed as an ''employees' securities company'' within the meaning of section 2(a)(13) of the Act, and will operate as a closed-end, non-diversified, management investment company.

A subsequent Investment Entity may be structured as a general partnership or as a domestic or offshore limited partnership, limited liability company, or corporation. The Investment Entities are established to reward and retain Eligible Employees (as defined below) and to attract highly qualified personnel to the Company. No Eligible Employee will be required to invest in any Investment Entity.

3. The Company will act as the managing partner (''Managing Partner'') of the Initial Investment Entity. The Managing Partner of subsequent Investment Entities will be the Company, a successor entity, (*i.e.,* an entity or entities that result from a reorganization into another jurisdiction or a change in the type of business organization of the Company) or an affiliated person (as defined in section 2(a)(3)(C) of the Act) of the Company (''Control Affiliate''). A person serving as an investment adviser to an Investment Entity will be registered as an investment adviser under the Advisers Act, if required under applicable law.

4. No fee will be charged to an Investment Entity by the Managing Partner and no compensation will be paid by an Investment Entity or its Partners to the Managing Partner for its services in such capacity. No Investment Entity will be charged management fees by the Company, or any of its affiliates. The Managing Partner may require an Investment Entity to reimburse it for direct costs of disbursements and expenses that it incurs on behalf of such Investment Entity.

5. Interests in the Investment Entities (''Interests'') will be offered without registration in reliance on section 4(2) of the Securities Act of 1993 (the ''1933 Act'') or Regulation D under the 1933 Act and will be sold without a sales charge. Interests will be sold solely to ''Eligible Investors.''

Eligible Investors will consist of: (a) Eligible Employees (as defined below); (b) trusts and other investments vehicles of which the trustees, grantors and/or beneficiaries are Eligible Employees or of which the beneficiaries are immediate family members (spouses, parents, children, spouses of children, brothers, sisters, and grandchildren) of Eligible Employees and charitable organizations, including self-directed retirement plan vehicles (including individual retirement accounts); (c) partnerships, corporations or other entities all of the voting power of which is controlled by Eligible Employees; and (d) the Company.

Prior to offering interests in an Investment Entity to an Eligible Employee, the Managing Partner must reasonably believe that the Eligible Employee will be a sophisticated investor capable of understanding and evaluating the risks of participating in the Investment Entity without the benefit of regulatory safeguards. Eligible Employees will be experienced professionals in the leveraged buy out, venture capital, investment banking or management consulting business, or in related administrative, financial, accounting or operational activities.

6. An ''Eligible Employee'' is an individual who at the time of an offer for an Interest in an Investment Entity is:

(a) A professional or key administrative employee of the Company or a Control Affiliate, or a former professional employee of the Company or a Control Affiliate, and is an accredited investor meeting the income requirements set forth in rule 501(a)(6) of Regulation D under the 1933 Act; or

(b) an employee of the Company or a Control Affiliate who: (i) Will be

involved in managing the finances or the day-to-day affairs of the Investment Entities or in locating, structuring or administering the investments made by the Investment Entities; (ii) has an individual rate of annual compensation from all sources of at least $120,000, (iii) has a reasonable expectation of having the same rate of annual compensation in each of the two immediately succeeding years; and (iv) has such knowledge and experience in financial and business matters that he will be capable of evaluating the merits and risks of the proposed investments. A maximum of 35 persons who do not meet the income requirements of Regulation D under the 1933 Act at the time an offer for an Interest is made will be admitted to any Investment Entity.

7. Before participating in an Investment Entity, Eligible Employees will be provided with a copy of the organizational documents of the Investment Entity, which will set forth the specific investment objectives and strategies of the Investment Entity, and a description of the relevant risks associated with an investment in an Investment Entity.

8. Each Investment Entity will send the Eligible Investors that participate in the Investment Entity (''Partners'') an annual repot regarding its operations which will contain unaudited financial statements. Within 90 days after the end of each fiscal year, or as soon as practicable thereafter, each Investment Entity will transmit to each Partner a report indicating its Share of the income or losses of the Investment Entity for federal income tax purposes for the fiscal year most recently ended.

9. An Investment Entity will maintain a separate class of capital accounts for Partners who are participating in a particular investment (the ''Participating Partners''). Capital contributions made to an Investment Entity by or on behalf of Participating Partners will be allocated pro-rata to the capital sub-accounts relating to a particular investment for such Participating Partners. Partners who do not participate in a particular investment will have no interest in, or capital sub-account with respect to, such investment. A Partner's percentage share will differ from one sub-account to another, such that each Partner's proportionate mix of investments is likely to differ from each other Partner's and from an Investment Entity's aggregate investments.

10. In addition to co-investment opportunities with the Bain Funds, the Managing Partner of the Initial Investment Entity may make other investment opportunities not related to Bain Fund investments available to one or more Partners who are Eligible Investors and in the case of any follow-on investment in a portfolio company, the Managing Partner may also, in its discretion, make such opportunity available to Partners who participated in earlier investments by the Initial Investment Entity in such portfolio company.

11. Partners will not be entitled to redeem their interest in the Initial Investment Entity. A Partner will be permitted to transfer its interest only with the express consent of the Managing Partner and only to an Eligible Investor. Upon a Partner's death, the Partner's estate will be substituted as a Partner.

12. The Managing Partner may require a Partner to withdraw from an Investment Entity if: (a) The Partner is no longer deemed to be able to bear to economic risk of investment in an Investment Entity; (b) an Investment Entity may suffer adverse tax consequences if a particular Partner were to remain; (c) the continued participation of the Partner would violate applicable law or regulations; or (d) the Managing Partner; in its sole discretion, deems such withdrawal to be in the best interest of the Investment Entity and any of its affiliated persons (as defined in section 2(a)(3)(C) of the Act).

If a Partner is required to withdraw, an Investment Entity may, in its sole discretion, require the Partner to sell its Interest in the Investment Entity. The purchase price for the sale of a withdrawing Partner's Interest would be equal to the Partner's capital account for the Investment as of the date the Partner is requested to withdraw determined as if the capital account were credited or charged with the income, realized and unrealized gains, expenses, and realized and unrealized losses attributable to the investment as determined by the Managing Partner.

13. An Investment Entity will not acquire any security issued by a registered investment company if, immediately after such acquisition, the Investment Entity would own more than 3% of the outstanding voting stock of the registered investment company.

14. Each Investment Entity may invest in investment opportunities offered to or by, or that come to the attention of, the Company, including opportunities in which the Company, its affiliates and/or its employees (including Partners of the Investment Entities) may invest for their own respective accounts. The Investment Entities may also sell securities to, or buy securities from, the Company, its affiliates, or its employees and may distribute securities in-kind to Partners. The Company may perform services for entities in which an Investment Entity invests and may be paid by such entities for such services and for related disbursements and charges.

Applicant's Legal Analysis

1. Section 6(b) of the Act provides, in part, that the SEC will exempt employees' securities companies from the provisions of the Act to the extent that such exemption is consistent with the protection of investors. Section 6(b) provides that the SEC will consider, in determining which provisions of the Act from which the company should be exempt, the company's form of organization and capital structure, the persons owning and controlling its securities, the price of the company's securities and the amount of any sales load, how the company's funds are invested, and the relationship between the company and the issuers of the securities in which it invests.

Section 2(a)(13) of the Act defines an employees' security company, in relevant part, as any investment company all of whose outstanding securities are beneficially owned: (a) By current or former employees, or persons on retainer, of one or more affiliated employers; (b) by immediate family members of such employees; or (c) by such employer or employers together with any of the persons in (a) or (b).

2. Section 7 of the Act generally prohibits investment companies that are not registered under section 8 of the Act from selling or redeeming their securities. Section 6(e) of the Act provides that, in connection with any order exempting an investment company from any provision of section 7, certain provisions of the Act, as specified by the SEC, will be applicable to the company and other persons dealing with the company as though such company were registered under the Act.

Applicants request an order under sections 6(b) and 6(e) of the Act exempting them from all provisions of the Act, except section 9, sections 17 (other than certain provisions of paragraphs (a), (d), (f), (g), and (j)), and 30 (other than certain provisions of paragraphs (a), (b), (e), and (h)), and sections 36 through 53, and the rules and regulations under the Act.

3. Section 17(a) generally prohibits any affiliated person (as defined in section 2(a)(3) of the Act) of a registered investment company, or any affiliated person of such person, acting as principal, from knowingly selling or

purchasing any security or other property to or from the company.

Applicants request an exemption from section 17(a) to permit:

(a) The Company and Control Affiliates, acting as principal, to engage in any transaction directly or indirectly with any Investment Entity or any entity controlled by an Investment Entity;

(b) Any Investment Entity to invest in or engage in any transaction with any entity, acting a principal: (i) in which an Investment Entity, and entity controlled by an Investment Entity, the Company or Control Affiliate has invested or will invest; or (ii) with which an Investment Entity, any entity controlled by an Investment Entity, the Company or any Control Affiliate is or will become otherwise affiliated; and

(c) A partner or other investor of an investment vehicle for investors who are not affiliated with the Company, over which the Company or a Control Affiliate exercises investment discretion, and any affiliate of that partner or investor (collectively, ''Third Party Investors''), acting as principal, to engage in any transaction directly or indirectly with an Investment Entity or any entity controlled by an Investment Entity.

4. Applicants state that an exemption from section 17(a) is consistent with the protection of investors. Applicants assert that, prior to investing, Eligible Employees will be provided with a copy of the organizational documents of an Investment Entity, which will set forth its specific investment objectives and strategies. Applicants believe that the Eligible Employees will be able to understand and evaluate the risks associated with participation in an Investment Entity. Applicants assert that the community of interest among the Partners and the Company will reduce the risk of abuse in such transactions. Applicants also acknowledge that any transaction subject to section 17(a) for which exemptive relief has not been requested would require specific approval from the SEC.

5. Section 17(d) of the Act and rule 17d–1 under the Act prohibit any affiliated person or principal underwriter of a registered investment company, or any affiliated person of an affiliated person or principal underwriter, acting as principal, from participating in any joint arrangement with the company unless authorized by order of the SEC.

Applicants request relief to permit an Investment Entity to participate in joint transactions involving:

(a) An investment in a security: (i) in which the Bain Funds, the Company, another Investment Entity or an affiliated person of any of the Bain Funds, the Company or an Investment Entity, or a transferee of one of these, is a participant or becomes a participant; or (ii) with respect to which the Company or any affiliated person thereof is entitled to receive fees or compensation of any kind, including, but not limited to, transaction fees, consulting fees, management fees or other economic benefits or interests; and

(b) Any investment vehicle sponsored, offered or managed by the Company, another Investment Entity or any affiliated person of the Company or an Investment Entity.

6. Applicants assert that the flexibility to structure co- and joint investments in the manner described in the application will not involve abuses of the type section 17(d) an rule 17d–1 were designed to prevent. Applicants state that, because attractive investment opportunities of the types considered by the Investment Entities often require that each participant make available funds in an amount that may be substantially greater than that available to an Investment Entity alone, there may be certain attractive opportunities of which an Investment Entity may be unable to take advantage except as a co-participant with other persons, including affiliated persons.

Applicants state also that, in light of the Company's purpose of establishing the Investment Entities to reward Eligible Investors and to attract highly-qualified personnel to the Company, the possibility is minimal that an affiliated-party investor will enter into a transaction with an Investment Entity with the intent of disadvantaging the Investment Entity. Applicants assert that strict compliance with section 17(d) could cause an Investment Entity to forgo investment opportunities simply because a Partner, the Company, or another affiliated person of the Investment Entity also had or was making such investment and would prevent the Investment Entity from achieving its primary investment purpose of investing alongside the Bain Funds.

7. Section 17(f) of the Act designates the entities that may act as investment company custodians, and rule 17f–2 specifies the requirements for a registered management investment company to maintain custody of its investments.

Applicants request an exemption from the requirements of section 17(f) of the Act and rule 17f–2 under the Act to permit the following exceptions from the requirements of rule 17f–2:

(a) Compliance with paragraph (b) of the rule may be achieved through safekeeping in the locked files of the Company or of a partner of the Company;

(b) For purposes of paragraph (d) of the rule: (i) employees of the Company will be deemed employees of the Investment Entities, (ii) officers of the Managing Partner of an Investment Entity will be deemed to be officers of such Investment Entity, (iii) the Managing Partner of an Investment Entity will be deemed to be the board of directors of such Investment Entity; and

(c) In place of the verification procedure under paragraph (f) of the rule, verification will be effected quarterly by two employees of the Company. Applicants submit that, because may of the Investment Entities' investments will be evidenced only by partnership agreements or similar documents, rather than by negotiable certificates which could be misappropriated, such instruments are most suitably kept in the Company's files where they can be referred to as necessary. Applicants also state that each Investment Entity comply with all other requirements of rule 17f–2.

8. Section 17(g) of the Act and rule 17g–1 under the Act generally require the bonding of officers and employees of a registered investment company who have access to its securities or funds. Rule 17g–1 requires that a majority of directors who are not interested persons take certain actions and give certain approvals relating to fidelity bonding.

Applicants state that it is likely that all members of the board of directors of the Managing Partners (''Board Members'') would be considered interested persons of the Investment Entities. Applicants request exemptive relief to permit a majority of the Board Members, regardless of whether they are interested persons, to take certain actions and make certain approvals concerning bonding required by rule 17g–1.

Applicants state that the Investment Entities could not comply with rule 17g–1 without the requested relief. Applicants also state that each Investment Entity will comply with all other requirements of rule 17g–1.

9. Section 17(j) and rule 17j–1(b) make it unlawful for certain persons to engage in fraudulent or deceptive practices in connection with the purchase or sale of a security held or to be acquired by a registered investment company. Rule 17j–1 also requires that every registered investment company adopt a written code of ethics and that every access person of a registered

investment company report personal securities transactions. Applicants request an exemption from the requirements of rule 17j–1 under the Act, with the exception of the anti-fraud provisions of paragraph (b), because they would be unnecessary and burdensome in the case of the Investment Entities.

10. Applicants request an exemption from the requirements in sections 30(a), 30(b), and 30(e), and the rules under those sections, that registered investment companies prepare and file with the SEC and mail to their shareholders certain periodic reports and financial statements. Applicants contend that the forms prescribed by the SEC for periodic reports have little relevance to the Investment Entities and would entail administrative and legal costs that outweigh any benefit to the Partners. Applicants request exemptive relief to the extent necessary to permit each Investment Entity to report annually to its Partners.

Applicants also request an exemption from section 30(h) to the extent necessary to exempt the Managing Partner, Board Members and any other persons who may be deemed to be members of an advisory board of an Investment Entity from filing Forms 3, 4, and 5 under section 16(a) of the Securities Exchange Act of 1934 (the ''Exchange Act'') with respect to their ownership of Interests in the Investment Entities. Applicants assert that, because there will be no trading market and the transfers of Interests will be severely restricted, these filings are unnecessary for the protection of investors and burdensome to those required to make them.

Applicant's Conditions

Applicants agree that any order granting the requested relief shall be subject to the following conditions:

1. Each proposed transaction otherwise prohibited by section 17(a) or section 17(d) and rule 17d–1 (the ''Section 17 Transactions'') will be effected only if the Managing Partner determines that:

(A) The terms of the Section 17 Transaction, including the consideration to be paid or received, are fair and reasonable to the affected Partners of the participating Investment Entity and do not involve overreaching of the Investment Entity or its Partners on the part of any person concerned; and

(b) The Section 17 Transaction is consistent with the interests of the Partners of the participating Investment Entity, the Investment Entity organizational documents, and the Investment Entity's reports to its Partners.

In addition, the Managing Partner will record and preserve a description of such section 17 Transactions, its findings, the information or materials upon which its findings are based and the basis therefor. All such records will be maintained for the life of an Investment Entity and at least two years thereafter, and will be subject to examination by the SEC and its staff. All such records will be maintained in an easily accessible place for at least the first two years.

2. In any case where purchases or sales are made from or to an entity affiliated with an Investment Entity by reason of a 5% or more investment in such entity by a director, officer, or employee of the Managing Partner, such individual will not participate in the Managing Partner's determination of whether or not to make such investment available to the Partners of an Investment Entity.

3. The Managing Partner will adopt, and periodically review and update, procedures designed to ensure that reasonable inquiry is made, prior to the consummation of any Section 17 Transaction, with respect to the possible involvement in the transaction of any affiliated person of the Investment Entities, or any affiliated person of such a person.

4. The Managing Partner will not make available to the Partners of an Investment Entity any investment in which a Co-Investor, as defined below, has or proposes to acquire the same class of securities of the same issuer, where the investment involves a joint enterprise or other joint arrangement within the meaning of rule 17d–1 in which the Investment Entity and the Co-Investor are participants, unless any such Co-Investor, prior to disposing of all or part of its investment:

(a) Gives the Managing Partner of the participating Investment Entity holding such investment sufficient, but not less than one day's, notice of its intent to dispose of its investment; and

(b) Refrains from disposing of its investment unless the participating Investment Entity holding such investment has the opportunity to dispose of its investment prior to or concurrently with, on the same terms as, and on a *pro rata* basis with, the Co-Investor.

The term ''Co-Investor'' means any person who is a: (a) An affiliated person of the Investment Entity who is under common control with the Investment Entity, or controlled by the Company; [1] (b) the Company and any entities controlled by the Company; (c) a current or former managing director of the Company; (d) an investment vehicle offered, sponsored, or managed by the Company or an affiliated person of the Company; or (e) a company in which the Managing Partner acts as a general partner or in a similar capacity, or has a similar capacity to control the sale or disposition of the company's securities.

The restrictions contained in this condition, however, shall not be deemed to limit or prevent the disposition of an investment by a Co-Investor:

(a) To its direct or indirect wholly-owned subsidiary, to any Company (a ''parent'') of which the Co-investor is a direct or indirect wholly-owned subsidiary, or to a direct or indirect wholly-owned subsidiary of its parent;

(b) to immediate family members (spouses, parents, children, spouses of children, brothers, sisters and grandchildren) of the Co-investor or a trust established for any such family member;

(c) When the investment is comprised of securities that are listed, on a national securities exchange registered under section 6 of the Exchange Act; or

(d) When the investment is comprised of securities that are, national market system securities pursuant to section 11A(a)(2) of the Exchange Act and rule 11Aa2–1 thereunder.

5. The Managing Partner of each Investment Entity will send to each Partner who had an interest in that Investment Entity at any time during the fiscal year then ended, Investment Entity financial statements. Such financial statements may be unaudited. In addition, within 90 days after the end of each fiscal year of each of the Investment Entities or as soon as practicable thereafter, the Managing Partner shall send a report to each person who was a partner at any time during the fiscal year then ended, setting forth such tax information as shall be necessary for the preparation by the Partner of his federal and state income tax returns and a report of the investment activities of the Investment Entity during such year.

The Managing Partner will make a valuation or have a valuation made of all of the assets of the Investment Entities as of the end of each fiscal year in a manner consistent with the

[1] Such persons shall not include any parties who may be affiliated persons of the Investment Entity solely because they have co-invested in an investment vehicle or joint enterprise, where neither the Investment Entity nor the Company exercises control over such persons.

customary practice with respect to the valuation of assets of the kind held by the Investment Entities which may include, in the case of co-investments with a Bain Fund, valuations provided by such Bain Fund.

6. Each Investment Entity and its Managing Partner will maintain and preserve, for the life of each such Investment Entity and at least two years thereafter, such accounts, books, and other documents as constitute the record forming the basis for the financial statements and annual reports of such Investment Entity to be provided to its Partners, and agree that all such records will be subject to examination by the SEC and its staff. All such records will be maintained in an easily accessible place for at least the first two years.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–13066 Filed 5–24–00; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42787; File No. SR–Amex–00–14]

Self-Regulatory Organizations; American Stock Exchange LLC; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 1 Relating to Generic Listing Standards Applicable to Listing Portfolio Depository Receipts and Index Fund Shares Pursuant to Rule 19b–4(e) Under the Securities Exchange Act of 1934

I. Introduction

On March 6, 2000, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish generic listing standards applicable to Portfolio Depository Receipts (''PDRs'') and Index Fund Shares. By establishing generic listing standards, the Amex may permit the listing and trading of PDRs and Index Fund Shares pursuant to Rule 19b–4(e) under the Act[3] without submitting a proposed rule change pursuant to Section 19(b) under the Act.[4] The proposed rule change was published for comment in the **Federal Register** on March 28, 2000.[5] No comments were received on the proposal. The proposal was amended on April 27, 2000.[6] In this notice and order, the Commission is seeking comment from interested persons on Amendment No. 1, and is approving the proposed rule change, including accelerated approval of Amendment No. 1.

II. Description of the Proposal

The proposal adds commentaries to Amex Rules 1000 and 1000A to provide standards to permit listing and trading of PDRs and Index Fund Shares pursuant to Rule 19b–4(e) under the Act.[7] The proposal requires that PDRs and Index Fund Shares listed pursuant to Rule 19b–4(e) be subject to specific generic criteria as set forth in proposed Amex Rule 1000, Commentary .03 (for PDRs) and Amex Rule 1000A, Commentary .02 and .03 (for Index Fund Shares). All other provisions of Amex Rules 1000 *et seq.* and 1000A *et seq.* will continue to apply to such securities.

The proposed implements generic listing criteria that are intended to ensure that a significant portion of the weight of an index or portfolio is accounted for by stocks with substantial market capitalization and trading volume. Proposed Commentary .03 to Amex Rule 1000 and Commentary .02 to Amex Rule 1000A both provide that, upon the initial listing of a series of PDRs or Index Fund Shares under Rule 19b–4(e), component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio must have a minimum market value of at least $75 million. In addition, the component stocks in the index must have a minimum monthly trading volume during each of the last six months of at least 250,000 shares for stocks representing at least 90% of the weight of the index or portfolio.

The most heavily weighted component stock in an underlying index cannot exceed 25% of the weight of the index or portfolio, and the five most heavily weighted component stocks cannot exceed 65% of the weight of the index or portfolio. The underlying index or portfolio must include a minimum of 13 stocks, which is the minimum number to permit qualification as a regulated investment company under Subchapter M of the Internal Revenue Code.[8] All securities in an underlying index or portfolio must be listed on a national securities exchange or The Nasdaq Stock Market (including the Nasdaq SmallCap Market).

Proposed Commentary .03 to Amex Rule 1000 and Commentary .02 to Amex Rule 1000A provide that the underlying index will be calculated based on either the market capitalization, modified market capitalization, price, equal-dollar or modified equal-dollar weighting methodology. In addition, if the index is maintained by a broker-dealer, the broker-dealer must erect a ''fire wall'' around the personnel who have access to information concerning changes and adjustments to the index and the index must be calculated by a third party who is not a broker-dealer. The current index value will be disseminated every 15 seconds over the Consolidated Tape Association's Network B.

The Reporting Authority will disseminate for each series of PDRs and Index Fund Shares an estimate, updated every 15 seconds, of the value of a share of each series. This may be based, for example, upon current information regarding the required deposit of securities plus any cash amount to permit creation of new shares of the series or upon the index value.

A minimum of 100,000 shares of a series of PDRs or Index Fund Shares will be required to be outstanding as of the start of trading. The minimum trading increment for a series of PDRs

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(e).

[4] 15 U.S.C. 78s(b).

[5] Securities Exchange Act Release No. 42542 (March 17, 2000), 65 FR 16437.

[6] *See* letter from Michael J. Ryan, Chief of Staff, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation (''Division''), SEC, dated April 24, 2000 (''Amendment No. 1''). In Amendment No. 1, Amex proposed to add Commentary .03 to Amex Rule 1000A, creating a product description delivery requirement for series that have been granted relief by the SEC from the prospectus delivery requirements of Section 24(d) of the Investment Company Act of 1940 (''1940 Act''). Amex also clarified the timing for compliance with the eligibility criteria and verified that the Exchange will require issuers of a series of PDRs or Index Fund Shares listed under Rule 19b–4(e) to represent to the Exchange that the index or portfolio of securities underlying such series will comply with the applicable eligibility criteria as of the date of initial deposit of securities to the trust or fund in connection with the initial issuance of shares of such trust or fund.

[7] 17 CFR 240.19b–4(e). Rule 19b–4(e) permits self-regulatory organizations (''SROs'') to list and trade new derivatives products that comply with existing SRO trading rules, procedures, surveillance programs and listing standards, without submitting a proposed rule change under Section 19(b).

[8] Under the Subchapter M of the Internal Revenue Code, for a fund to qualify as a regulated investment company the securities of a single issuer can account for no more than 25% of a fund's total assets, and at least 50% of a fund's total assets must be comprised of cash (including government securities) and securities of single issuers whose securities account for less than 5% of such fund's total assets.