

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43419; File No. SR-Amex-00-46]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the American Stock Exchange LLC Adopting Commentary to Section 713 That Defines "Public Offering" for Purposes of Shareholder Approval Rules

October 6, 2000.

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 August 16, 2000, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.⁴

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

The Amex proposes to adopt Commentary .01 to Section 713, to define the term "public offering" for purposes of the Exchange's shareholder approval rules. Below is the text of the proposed rule change, which is entirely new.

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Amex Rules, Sec. 713. Other Transactions, Commentary .01

Section 713 provides that shareholder approval is required for "a transaction involving the sale or issuance by the company of common stock (or securities convertible into or exercisable for common stock) equal to 20 percent or more of presently outstanding stock for less than the greater of book or market value of the stock."

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Amex filed its proposed rule change on August 16, 2000. On September 29, 2000, the Amex filed Amendment No. 1 that entirely replaced the original rule filing. See Letter from Michael J. Ryan, Senior Vice President, Chief of Staff and Senior Legal Officer, Amex, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission (September 29, 2000) ("Amendment No. 1"). In Amendment No. 1, the Amex also designated SR-Amex-00-46 as a proposed rule change under Section 19(b)(2) of the Act. 15 U.S.C. 78s(b)(2).

⁴ The National Association of Securities Dealers, Inc., through its wholly owned subsidiary The Nasdaq Stock Market Inc., has filed a similar proposed rule change (SR-NASD-00-50). See Securities Exchange Act Release No. 43420 (October 6, 2000).

Under this rule, shareholder approval is not required for a "public offering."

Issuers are encouraged to consult with Exchange staff in order to determine if a particular offering is a "public offering" for purposes of the shareholder approval rules. Generally, a firm commitment underwritten securities offering registered with the Securities and Exchange Commission will be considered a public offering for these purposes. Likewise, any other securities offering which is registered with the Securities and Exchange Commission and which is publicly disclosed and distributed in the same general manner and extent as a firm commitment underwritten securities offering will be considered a public offering for purposes of the shareholder approval rules. However, Exchange staff will not treat an offering as a "public offering" for purposes of the shareholder approval rules merely because they are registered with the Commission prior to the closing of the transaction.

When determining whether an offering is a "public offering" for purposes of these rules, Exchange staff will consider all relevant factors, including but not limited to:

- (i) The type of offering (including whether the offering is conducted by an underwriter on a firm commitment basis, or an underwriter or placement agent on a best-efforts basis, or whether the offering is self-directed by the issuer);
- (ii) The manner in which the offering is marketed (including the number of investors offered securities, how those investors were chosen, and the breadth of the marketing effort);
- (iii) The extent of the offering's distribution (including the number and identify of the investors who participate in the offering and whether any prior relationship existed between the issuer and those investors);
- (iv) The offering price (including the extent of any discount to the market price of the securities offered); and
- (v) The extent to which the issuer controls the offering and its distribution.

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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, 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.

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

1. Purpose

Section 713 of the Amex Company Guide requires shareholder approval for stock issuances of 20 percent or more of an issuer's total shares outstanding, offered at less than the greater of book or market value. The applicable rules further provide, however, that shareholder approval is not required for

a "public offering," although that term is not defined in the rules. The Exchange proposes to adopt Commentary .01 to Section 713, to clarify the definition of "public offering" for issuers and interested parties. According to the Amex, a number of issuers have recently inquired as to whether certain large, below-market offerings were "public offerings" because the transactions were registered with the Commission prior to closing the transactions.⁵ The Exchange notes that historically, for purposes of assessing the applicability of the shareholder approval rules, it has interpreted "public offering" as a broadly distributed, registered offering based on a firm commitment underwriting. Conversely, the Exchange does not consider a transaction to be a "public offering" for these purposes when the transaction is of limited distribution and/or is not based on a firm commitment underwriting, even if the offering was registered. Because the offerings described above had limited distributions and, in some cases, offerees that were predetermined by the issuer, the Exchange believes that these transactions were not "public offerings" for purposes of the shareholder approval rules.

The Amex expects that proposed Commentary .01 will ensure issuer understanding of how Amex determines whether a transaction is a "public offering" for purposes of the shareholder approval rules. The proposed Commentary identifies a number of factors that will be considered in establishing the existence of a "public offering." Such factors include the type of offering; the marketing of the offering; the extent of the offering's distribution; the offering price; and the extent to which the issuer controls the offering and its distribution. Decisions as to whether a transaction is a "public offering" for purposes of these rules will be based on the facts and circumstances surrounding each particular transaction.

2. Statutory Basis

The Exchange believes that the proposed Commentary to Section 713 is designed to educate issuers and other interested parties as to how the Exchange defines a "public offering" and ensure that issuers recognize which transactions require shareholder approval under the Exchange's rules. For this reason, the Exchange represents that the proposed rule change is consistent with Section 6(b) of the Act⁶ in general, and furthers the objectives of Section 6(b)(5)⁷ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

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

The Amex does not believe that the proposed rule change will impose any burden on competition that is not necessary

⁵ It is the Exchange's understanding that the Commission believes that this activity is not appropriate under Section 5 of the Securities Act of 1933. See 15 U.S.C. 77e

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

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

The Exchange has neither solicited nor received comments on the proposed rule change.

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, or

(B) Institute proceedings to determine whether the proposed rule change 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, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to the File No. SR-Amex-00-46 and should be submitted by November 6, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁸

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43421; File No. SR-PHLX-00-05]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment Nos. 1-4 by the Philadelphia Stock Exchange, Inc. Relating to Decimal Pricing

October 6, 2000.

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 10, 2000, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the PHLX. On August 7, 2000, the Exchange filed an amendment to the proposed rule change, which amendment completely replaced and superseded the original filing.³ Subsequently, the PHLX filed three additional amendments to the proposed rule change.⁴ The PHLX filed the proposal pursuant to Section 19(b)(3)(A) of the Act,⁵ and Rule 19b-4(f)(6) thereunder,⁶ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See August 4, 2000 letter from Jurij Trypupenko, Esq. ("Trypupenko"), PHLX, to Alton S. Harvey ("Harvey"), Division of Market Regulation ("Division"), SEC, and attachment ("Amendment No. 1"). Amendment No. 1 converts the original filing to a non-controversial proposal pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder, which renders the proposal effective upon filing with the Commission. The Commission accepts the original proposal as notice of the PHLX's intention to file the proposed rule change as a non-controversial proposal. See 15 U.S.C. 78s(b)(3)(A) and 17 CFR 240.19b-4(f)(6)(iii).

⁴ See August 31, 2000 letter from Trypupenko, PHLX, to Harvey, Division, SEC and attachment ("Amendment No. 2"). In Amendment No. 2, the PHLX deleted references to decimal "trading" and added language to refer to "quoting" and "pricing" in decimals. Amendment No. 2 also included proposed language to reflect an amendment to the Intermarket Trading System Plan regarding decimal pricing. See also September 7, 2000 letter from Trypupenko, PHLX, to Harvey, Division, SEC ("Amendment No. 3"). In Amendment No. 3, the Exchange deleted section (c) of proposed Rule 1034. See also October 6, 2000 letter from Trypupenko, PHLX, to Harvey, Division, SEC ("Amendment No. 4"). In Amendment No. 4, the PHLX made minor, technical corrections to certain proposed rule language.

⁵ 15 U.S.C. 78s(b)(3)(A).

⁶ 17 CFR 240.19b-4(f)(6).

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

The PHLX proposes to amend its rules to provide for the implementation of decimal pricing, in accordance with the joint submission to the Commission by the PHLX and other interested parties dated July 24, 2000, entitled "Decimals Implementation Plan for the Equities and Options Markets" ("Decimal Plan").

Proposed new PHLX Rule 134 establishes that, during the decimalization phase-in period established by the Decimals Plan, securities will be priced in fractions and in decimals, and that the Exchange may issue decimalization guidelines to its members, member organizations, participants, and participant organizations regarding, among other things, what equities and options on equities will be quoted in decimals and when, the timing of partial or full conversion to decimal pricing, and open order conversion and dividend processing.

In addition, the PHLX proposes to amend the following Options Advices: A-9, All-or-None Option Orders; A-11, Responsibility to Make Ten-Up Markets; B-11, Crossing, Facilitation and Solicited Orders; and F-6, Option Quote Parameters. The Exchange believes that the proposed amendments to these provisions are non-controversial in nature, and are necessary for the Exchange to convert from fraction to decimal pricing in accordance with the Decimals Plan.

Finally, the PHLX proposes to amend Rule 2001 to conform to the rule to amendments made to the Intermarket Trading System Plan.

The text of the proposed rule change, as amended, is available at the PHLX and at the Commission.

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 PHLX included statements concerning the purpose of and basis for its proposal and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The PHLX has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

⁸ 17 CFR 200.30-3(a)(12).