

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49302; File No. SR-Amex-2003-86]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC To Amend Section 605 of the Exchange's Company Guide Relating to the Requirements Applicable to Listed Company Auditors

February 23, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 3, 2003, the American Stock Exchange LLC ("Amex" 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 Exchange. On January 22, 2004, the Exchange submitted an amendment to the proposed rule change.<sup>3</sup> 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 section 605 of the Amex *Company Guide* with respect to the requirements applicable to listed company auditors. The text of the proposed rule change, as amended, is set forth below. Text in brackets indicates material to be deleted, and text in italics indicates material to be added.

\* \* \* \* \*

#### American Stock Exchange LLC Company Guide

Sec. 605 [Peer Review] Auditor Requirements

[(a) A listed company must be audited by an independent public accountant that:

(i) has received an external quality control review by an independent public accountant ("peer review") that determines whether the auditor's system of quality control is in place and operating effectively and whether

established policies and procedures and applicable auditing standards are being followed; or

(ii) is enrolled in a peer review program and within 18 months receives a peer review that meets acceptable guidelines.

(b) The following guidelines are acceptable for the purposes of Sec. 605:

(i) the peer review should be comparable to AICPA standards included in Standards for Performing on Peer Reviews, codified in the AICPA's SEC Practice Section Reference Manual;

(ii) the peer review program should be subject to oversight by an independent body comparable to the organizational structure of the Public Oversight Board as codified in the AICPA's SEC Practice Section Reference Manual; and

(iii) the administering entity and the independent oversight body of the peer review program must, as part of their rules of procedure, require the retention of the peer review working papers for 90 days after acceptance of the peer review report and allow the Exchange access to those working papers.]

*A listed company must be audited by an independent public accountant that is registered, as required, with the Public Company Accounting Oversight Board ("PCAOB").*

#### Commentary

*.01 In evaluating the eligibility of an issuer which has applied for listing, the Exchange will only consider financial statements provided in connection with the application and relied upon to demonstrate compliance by the applicant, if such financial statements were audited or reviewed, as required by applicable SEC requirements, by an independent public accountant that was, at the time of issuance of such financial statements, either registered with the PCAOB, or, for financial statements issued prior to the time the auditor was required to register with PCAOB, enrolled in the American Institute of Certified Public Accountants ("AICPA") or equivalent peer review program.*

\* \* \* \* \*

#### 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

Currently, section 605 of the Amex *Company Guide* requires Amex listed companies to be audited by an independent public accountant that participates in a peer review program, *i.e.*, an external quality control review by an independent public accountant that determines whether the auditor's system of quality control is in place and operating effectively and whether established policies and procedures and applicable auditing standards are being followed. In practice, section 605 of the Amex *Company Guide* requires that the auditor either be a member of the American Institute of Certified Public Accountants ("AICPA") SEC Practice Section, which subjects the auditor to the AICPA peer review program, or be enrolled in a peer review program with comparable standards.

Pursuant to the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act"), the Public Company Accounting Oversight Board ("PCAOB") was created to regulate accounting firms that prepare and issue audit reports on public companies that are either required to file reports with the Commission or that have filed a registration statement for a public offering of securities (together, "public companies"). The Sarbanes-Oxley Act further provides that 180 days after the Commission determines that the PCAOB is capable of carrying out its responsibilities, accounting firms that are not registered with PCAOB would be prohibited from preparing or issuing audit reports on public companies. In accordance with recently approved PCAOB rules, U.S. accounting firms were required to register by October 22, 2003.<sup>4</sup>

Accordingly, the Exchange proposes to revise section 605 of the Amex *Company Guide* to specify that Amex listed companies must be audited by an accounting firm registered, as required, with the PCAOB. New commentary to section 605 would also clarify that, in evaluating the eligibility of an issuer which has applied for listing, the Exchange would only consider financial statements provided in connection with the application and relied upon to demonstrate compliance by the applicant, if such financial statements

<sup>4</sup> Pursuant to PCAOB rules, foreign public accounting firms have been granted an additional 180 days to register (*i.e.*, until April 19, 2004).

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

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

<sup>3</sup> See letter from Eric Van Allen, Assistant General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated January 21, 2004, replacing Form 19b-4 in its entirety ("Amendment No. 1"). In Amendment No. 1, the Amex made technical changes to its proposed rule text and discussion.

were audited or reviewed, as required by applicable Commission requirements, by an independent public accountant that was, at the time of issuance of such financial statements, either registered with the PCAOB, or, for financial statements issued prior to the time the auditor was required to register with PCAOB, enrolled in the AICPA or equivalent peer review program.

In evaluating either the initial or continued listing eligibility of an issuer, the Exchange would consider the extent to which any PCAOB regulatory finding or action, a modified or adverse peer review opinion, or other regulatory issue with respect to a listed company's auditor raises concerns with respect to the reliability or integrity of the company's financial statements. As warranted, the Exchange would take action pursuant to its general authority to exclude issuers raising public interest concerns from listing (*i.e.*, sections 101 and 1003(f)(iii) of the *Amex Company Guide*) to either deny the listing application or delist the issuer.<sup>5</sup> In determining whether a public interest concern exists, the Exchange would consider the substance of the issue(s) raised, the independent accountant's response, including whether corrective action was taken, as well as any follow-up review or action by PCAOB or AICPA.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act<sup>6</sup> in general, and furthers the objectives of section 6(b)(5) of the Act<sup>7</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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 is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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

The Exchange believes that the proposed rule change will impose no burden on competition.

<sup>5</sup> Any such action would be subject to appropriate appeal procedures as set forth in Part 12 of the *Amex Company Guide*.

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 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*

No written comments were solicited or received with respect to 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, NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-Amex-2003-86. 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, comments should be sent in hard copy or by e-mail but not by both methods. 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 will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to file number SR-Amex-2003-86 and should be submitted by March 22, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-49300; File No. SR-BSE-2004-07]

### **Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto by the Boston Stock Exchange, Inc. Relating to the Extension of a Linkage Fee Pilot Program**

February 23, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 11, 2004, the Boston Stock Exchange, Inc. ("Exchange" or "BSE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On February 20, 2004, the BSE filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and is approving the proposed rule change, as amended, on an accelerated basis, until July 31, 2004.

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

The BSE proposes to extend the current pilot program applicable to Options Intermarket Linkage ("Linkage") fees<sup>4</sup> for six months until July 31, 2004.

The proposed fee schedule is available at the Exchange and at the Commission.

<sup>8</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See letter from John A. Boese, Assistant Vice President, Legal and Compliance, BSE, to Nancy J. Sanow, Assistant Director, Commission, dated February 19, 2004 ("Amendment No. 1"). In Amendment No. 1, the Exchange made technical corrections to the proposed rule change.

<sup>4</sup> See Exchange Act Release No. 49066 (January 13, 2004), 69 FR 2773 (January 20, 2004) (SR-BSE-2003-17) (Approving Linkage fees on a pilot basis to expire January 31, 2004).