

the principal office of the Amex. All submissions should refer to file number SR-Amex-99-27 and should be submitted by December 20, 2000.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁷⁰ that the proposed rule change (SR-Amex-99-27), as amended, is approved. The approved margin requirements shall become effective the earlier of February 27, 2001 or such date the Exchange represents in writing to the Commission that the Exchange is prepared to fully implement and monitor the approved margin requirements.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁷¹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43588; File No. SR-Amex-00-46]

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

November 17, 2000.

On August 16, 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 thereunder² a proposed rule change³ adopting commentary to Section 713 that defines "Public Offering" for purposes of shareholder approval rules.⁴

The proposed rule change was noticed in the **Federal Register**.⁵ On October 13, 2000, the Amex filed Amendment No. 2 to the proposed rule change.⁶ No comments were received on the proposed rule change. This order approves the proposed rule change, as amended.

I. Background

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.⁷ 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 pre-determined 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 help to ensure issuer understanding of how Amex determines whether a transaction is a

"public offering" for purposes of 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.

II. Discussion

The Commission finds that the proposed rule change is consistent with Section 6(b) of the Act⁸ in general, and furthers the objectives of Section 6(b)(5)⁹ 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.¹⁰ The Commission 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, thus promoting just and equitable principles of trade and protecting investors and the public interest.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposal, SR-Amex-00-46, as amended, be and hereby is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,

Deputy Secretary.

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⁷⁰ 15 U.S.C. 78s(b)(2).

⁷¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The National Association of Securities Dealers, Inc., through its wholly owned subsidiary The Nasdaq Stock Market, Inc., filed a similar proposed rule change (SR-NASD-00-50). See Securities Exchange Act Release No. 43420 (Oct. 6, 2000), 65 FR 61011 (Oct. 13, 2000).

⁴ 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 ("Division"), 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).

⁵ Securities Exchange Act Release No. 43419 (Oct. 6, 2000), 65 FR 61206 (Oct. 16, 2000).

⁶ Amendment No. 2 made a minor technical change to the proposal. See Letter from Claudia Crowley, Assistant General Counsel, Amex, to Florence Harmon, Esq., Senior Special Counsel, Division, SEC (Oct. 10, 2000). Because the amendment is technical, it does not need to be published for comment.

⁷ The Commission believes that this activity is not appropriate under Section 5 of the Securities Act of 1933. See 15 U.S.C. 77e.

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ In approving the proposal, the Commission has considered the rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹¹ 15 U.S.C. 78s(b)(2).

¹² 17 CFR 200.30-3(a)(12).