

John F. Colwell—Chief Counsel to Board Member.  
 Harold J. Datz—Chief Counsel to the Chairman.  
 John H. Ferguson—Associate General Counsel, Enforcement Litigation.  
 Terence Flynn—Chief Counsel to Board Member.  
 Robert A. Giannasi—Chief Administrative Law Judge.  
 Lester A. Heltzer—Executive Secretary.  
 John E. Higgins—Deputy General Counsel.  
 Peter B. Hoffman—Regional Director, Region 34.  
 Gloria Joseph—Director of Administration.  
 Barry J. Kearney—Associate General Counsel, Advice.  
 David B. Parker—Deputy Executive Secretary.  
 Gary W. Shinnars—Chief Counsel to Board Member.  
 Richard A. Siegel—Associate General Counsel, Operations-Management.  
 Lafe E. Solomon—Director, Office of Representation Appeals.  
 Peter D. Winkler—Chief Counsel to Board Member.

Dated: December 6, 2004 in Washington, DC, by direction of the Board.

**Lester A. Heltzer,**  
*Executive Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meeting during the week of January 3, 2005:

A closed meeting will be held on Thursday, January 6, 2005, at 10 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552(b)(3), (5), (7), (9)(B), and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Glassman, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the Closed Meeting scheduled for Thursday, January 6, 2005, will be:

Formal orders of investigations; Institution and settlement of injunctive actions; and Institution and settlement of administrative proceedings of an enforcement nature.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942-7070.

Dated: December 28, 2004.

**Jill M. Peterson,**  
*Assistant Secretary.*

[FR Doc. 04-28699 Filed 12-28-04; 11:37 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50927; File No. SR-Amex-2004-50]

### Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment Nos. 1, 2, and 3 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 4 and 6 to the Proposed Rule Change by the American Stock Exchange LLC Relating to the National Association of Securities Dealers, Inc.'s Sale of Its Interest in the American Stock Exchange LLC to The Amex Membership Corporation

December 23, 2004.

#### I. Introduction

On June 30, 2004, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,<sup>1</sup> as amended (the "Act"), and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend its Constitution and certain other organizational documents. On July 15, 2004, the Exchange filed Amendment No. 1 to the proposal.<sup>3</sup> On July 21, 2004, the Exchange filed Amendment No. 2 to

the proposal.<sup>4</sup> The proposed rule change was published for comment in the **Federal Register** on July 28, 2004.<sup>5</sup> The Commission received no comment letters regarding the proposed rule change. On August 16, 2004, Amex filed Amendment No. 3 to the proposal.<sup>6</sup> On September 1, 2004, the Exchange filed Amendment No. 4 to the proposed rule change.<sup>7</sup> On December 17, 2004, the Exchange filed Amendment No. 5 to the proposed rule change.<sup>8</sup> The Exchange withdrew Amendment No. 5 on December 21, 2004. On December 22, 2004, the Exchange filed Amendment No. 6 to the proposed rule change.<sup>9</sup> This

<sup>4</sup> See letter from Michael J. Ryan, Jr., Executive Vice President and General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated July 20, 2004 ("Amendment No. 2"). Amendment No. 2 corrected formatting errors in the Amex Constitution, the Amended and Restated Exchange Limited Liability Company Agreement, the Second Restated Certificate of Incorporation of The Amex Membership Corporation, and the Amended and Restated By-Laws of The Amex Membership Corporation that were filed with Amendment No. 1; no substantive changes to these documents were made in Amendment No. 2.

<sup>5</sup> See Securities Exchange Act Release No. 50057 (July 22, 2004), 69 FR 45091 (the "Amex Notice").

<sup>6</sup> See letter from Michael J. Ryan, Jr., Executive Vice President and General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated August 13, 2004 ("Amendment No. 3"). In Amendment No. 3, Amex revised Section 2 of its Form 19b-4 (Procedures of the Self-Regulatory Organization) to reflect the Exchange Board of Governors' action approving the final forms of the governance documents submitted as part of the proposal. Amendment No. 3 is a technical amendment, and, therefore, not subject to notice and comment.

<sup>7</sup> See letter from Bruce Ferguson, Associate General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated August 30, 2004 ("Amendment No. 4"). In Amendment No. 4, Amex amended Section 3 of Article II of the Amex Constitution to clarify that Exchange Board members, among other things, would be required to take into consideration the self-regulatory function of the Exchange and the Exchange's obligations (and their obligations) under the Act. Exhibit A to Amendment No. 4, which sets forth these changes, is available on the Commission's Web site (<http://www.sec.gov/rules/sro.shtml>). The changes proposed in Amendment No. 4 have been incorporated into this order.

<sup>8</sup> See letter from Michael J. Ryan, Jr., Executive Vice President and General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated December 17, 2004 ("Amendment No. 5").

<sup>9</sup> See Amendment No. 6, dated December 22, 2004 ("Amendment No. 6"). Amendment No. 6 amends Sections 4(a) and 4(d) of Article II of the Amex Constitution, and related portions of Form 19b-4, to provide that the Chief Regulatory Officer will report only to the Regulatory Oversight Committee. Amendment No. 6 also sets forth certain Undertakings applicable to Amex. Exhibit 5 to Amendment No. 6, which sets forth these changes to Sections 4(a) and 4(d) of Article II of the Amex Constitution and the Undertakings, is available on the Commission's Web site (<http://www.sec.gov/rules/sro.shtml>). These changes and the Undertakings have been incorporated into this order. (The Commission further notes that the Undertakings are Exhibit E to the Form 19b-4.)

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

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

<sup>3</sup> See letter from Michael J. Ryan, Jr., Executive Vice President and General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated July 13, 2004 ("Amendment No. 1"). Amendment No. 1 replaced Amex's original filing in its entirety.

order approves the proposed rule change, as amended, grants accelerated approval to Amendment Nos. 4 and 6 to the proposed rule change, and solicits comments from interested persons on Amendment Nos. 4 and 6.

## II. Description of Proposed Rule Change

Ownership interests in the American Stock Exchange LLC currently consist of a Class A Participation Interest held by The Amex Membership Corporation ("MC") and a Class B Participation Interest held by New NASD Holdings, Inc. ("NAHO"), a wholly owned subsidiary of the National Association of Securities Dealers, Inc. ("NASD"). Pursuant to a proposed transaction between the parties ("Transaction"), MC will become the sole owner of the Exchange through the acquisition of 100% of the Class B Participation Interest in the Exchange from NAHO. To implement the terms of the Transaction and institute new governance structures for the Exchange and MC, the Exchange has filed amendments to its Constitution, the Second Restated Certificate of Incorporation of MC ("MC Certificate of Incorporation"), the Restated By-Laws of MC ("MC Bylaws"), and the Amended & Restated Exchange Limited Liability Company Agreement ("LLC Agreement"). Each of these documents will become effective upon the closing of the Transaction.

### A. The Transaction

Through MC Acquisition Sub, a corporate subsidiary, MC will acquire 100% of the Class B Participation Interest in the Exchange from NAHO.<sup>10</sup> Thus, upon consummation of the Transaction, MC will beneficially own 100% of the equity of the Exchange. Following the consummation of the Transaction, the Class B Participation Interest will represent a non-voting interest in the Exchange; the Class A Participation Interest, which will continue to be held directly by MC, will represent the sole voting interest in the Exchange. In addition, all rights to trade through the facilities of the Exchange will continue to be owned by MC.

At the closing of the Transaction, NASD and the Exchange will restructure an existing \$50 million loan owed by the Exchange to NASD. Under the terms of the arrangement, among other things, the Exchange will have the ability to satisfy all obligations under this loan in full for \$25 million plus accrued interest

if it is repaid within the first year following the closing of the Transaction. At the closing of the Transaction, NASD and the Exchange will enter into a Revolving Credit Facility, pursuant to which the Exchange will have the ability to borrow from NASD up to a maximum, at any one time, of \$25 million.

Subject to the terms of the Transaction, the agreements relating to the 1998 transaction whereby NASD acquired the Class B Participation Interest in the Exchange (the "1998 Transaction"), including the 1998 Transaction Agreement and the 1998 Technology Transfer Agreement, will be terminated and the 1998 Limited Liability Company Agreement of the Exchange will be amended.<sup>11</sup> As the Transaction will effectively result in an unwinding of the 1998 Transaction, NASD, the Exchange, and MC will enter into certain mutual releases of obligations, including those arising under the 1998 Agreements and otherwise related to the 1998 Transaction.

NAHO will pay in full the remaining commitment under the 1998 Seat Fund Program to the owners of regular and options principal memberships of the Exchange, which is an aggregate of approximately \$17.144 million (including accrued interest) as of January 31, 2004. Such amount will be distributed *pro rata* to the owners of the Exchange's regular and options principal memberships, with each regular and options principal membership receiving an equal amount of approximately \$20,483, plus additional accrued interest on such amount at an annual rate of 5% from January 31, 2004 through the closing of the Transaction.

The existing rights and obligations of the members regarding trading through the Exchange will not be affected by the Transaction. Trading rights will continue to be owned by MC and represent the right to trade through the facilities of the Exchange. In connection with the termination of the 1998 Transaction Agreement, the regular and options principal members will no longer have the special rights to approve material market changes to the Exchange's equity and options businesses that were put in place at the time NASD took control of the Exchange. However, under the proposed changes, no amendment to the Exchange Constitution that would result in a material change in the market structure

or operations of the Exchange shall be made without first obtaining the consent from the Board of Directors of MC. In addition, as discussed below, Amex regular and options principal members will have the ability to elect the members of the Exchange Board of Governors and the MC Board of Directors.

### B. LLC Agreement

The LLC Agreement will, among other things, establish the rights and obligations of MC and MC Acquisition Sub as equity owners of Amex and vest the Exchange Board with its management powers. The LLC Agreement also provides for the indemnification of any person involved in an action, suit or proceeding related to such person's affiliation with the Exchange if such person acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of Amex and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful.<sup>12</sup>

### C. Corporate Structure and Governance of the Exchange

The new governance structure for the Exchange will provide for a Board of Governors selected by the Exchange's regular and options principal members, who also will have the opportunity to vote on a "pass-through" basis on certain significant matters involving the Exchange, including the sale, issuance, transfer or other disposition of any equity security of the Exchange, or the issuance of any new trading rights by the Exchange. The new governance provisions also will provide that the Exchange Board of Governors will be largely independent and will have board committees composed primarily of Independent Governors, as defined below, with substantial authority over compensation, audit, regulatory and corporate governance matters, as well as the nomination of Governors to serve on the Exchange Board of Governors.

#### 1. Board of Governors

The size of the Exchange's Board of Governors will be reduced from eighteen to fifteen Governors. Nine of the Governors will be "Independent Governors" and six of the Governors will be "Industry Governors." An Independent Governor will be any person that is: (1) Not an officer or employee of, and has no material business relationship with, the Exchange and the holders of the Class

<sup>10</sup> According to the Exchange, MC Acquisition Sub will be formed for the sole purpose of acquiring and holding the Class B Participation Interest; it is being used to avoid a technical liquidation of the Exchange as a result of the closing of the Transaction.

<sup>11</sup> See Exchange Act Release No. 40622 (October 30, 1998), 63 FR 59819 (November 5, 1998) (order approving the 1998 Transaction).

<sup>12</sup> See Section 6.3 of the LLC Agreement.

A and Class B Participation Interests; (2) not a director of the holders of the Class A or Class B Participation Interest; and (3) not (i) a member, lessor or lessee of a membership, (ii) employed by, or affiliated or associated with, an entity that (x) is a member, (y) otherwise has trading rights or privileges on the Exchange or (z) is a broker or dealer, or (iii) a director, officer or employee of an issuer of securities that are listed on the Exchange.<sup>13</sup> In addition, the Independent Governors will meet such additional criteria for independence or otherwise that are not inconsistent with the criteria above as may be established by the Amex Nominating and Corporate Governance Committee from time to time.<sup>14</sup>

Of the six Industry Governors of the Exchange, (1) two will be persons who spend a substantial portion of their time on the floor of the Exchange (the "Floor Governors"); (2) one will be the owner of a regular or options principal membership (the "Membership Governor"); (3) one will be affiliated with a regular or associate member organization that engages in a business having substantial direct contact with public securities customers (the "Upstairs Governor"); (4) one will be a director, officer, employee or representative of an issuer of securities that are listed on the Exchange (the "Listed Company Governor"); and (5) one will be the Exchange's Chief Executive Officer (the "Management Governor").<sup>15</sup>

The Chairman of the Exchange Board of Governors may be the Management Governor or any Independent Governor. If the Management Governor is designated as the Chairman of the Exchange Board of Governors, the Board will also designate an Independent Governor as the "Lead Governor" to preside over executive sessions of the Exchange Board of Governors (*i.e.*, meetings of the Exchange Board of Governors without management or staff of the Exchange). The Management Governor will not participate in executive sessions. The Exchange will publicly disclose the Lead Governor's name and a means by which interested parties may communicate with the Lead Governor. If a Lead Governor has been designated by the Exchange Board of Governors, the Lead Governor will exercise the powers and discharge the duties of the Chairman in calling and presiding at meetings of the Exchange

Board of Governors in the case of the absence or inability to act of the Chairman.<sup>16</sup>

All Governors elected at the annual meeting for the election of Governors will serve two-year terms and will hold office until their successors are elected. No Governor (other than the Management Governor) who has served four consecutive terms as a Governor will be eligible for election as a Governor except after an interval of two years; *provided, however*, that service on the Exchange Board of Governors prior to January 1, 1999 will not be taken into account for these purposes.<sup>17</sup>

All nominees for election as Governor (as well as for members of the Amex Adjudicatory Council ("Council Members"),<sup>18</sup> and Trustees of the Gratuity Fund ("Trustees"))<sup>19</sup> will be selected by (i) the Amex Nominating and Corporate Governance Committee or (ii) by petition of the members to the Amex Nominating and Corporate Governance Committee.<sup>20</sup> The nominees for election as Governors will reflect the applicable terms of office and the classifications of Governors as set forth above.<sup>21</sup> The nomination process will be as follows:

The members may propose nominees for Governors, Council Members, and Trustees to the Amex Nominating and Corporate Governance Committee for consideration by written submission filed with the Secretary of the Exchange for delivery to the Amex Nominating and Corporate Governance Committee not less than 12 weeks prior to the date of the annual meeting of the members. In the event that any question is raised as to whether any candidate meets the criteria for the appropriate classification, such matter shall be determined by the Amex Nominating and Corporate Governance Committee, subject to the right of appeal to the full Board of Governors.<sup>22</sup>

The Amex Nominating and Corporate Governance Committee will then report to MC at least eight weeks prior to the date of the annual meeting of the members, the names of candidates nominated by it as Governors, Council Members, and Trustees. The report of

the Amex Nominating and Corporate Governance Committee will be promptly disseminated or made available to the MC members by posting or other appropriate means and will be promptly forwarded to the Secretary of MC for mailing to the members in accordance with the MC Bylaws.<sup>23</sup>

Members may also nominate candidates for Governors, Council Members, and Trustees by written petition filed with the Amex Nominating and Corporate Governance Committee within three weeks after the dissemination of the report of the Amex Nominating and Corporate Governance Committee.<sup>24</sup> In the event that any question is raised as to the validity of the signatures set forth on a petition or whether any candidate meets the criteria for the appropriate classification, such matter shall be determined by the Amex Nominating and Corporate Governance Committee, subject to the right of appeal to the full Exchange Board of Governors.<sup>25</sup> The persons nominated by valid petition shall be deemed nominees for the offices and positions set forth in such petition and shall be included on the ballot sent to MC by the Amex Nominating and Corporate Governance Committee. A statement of the candidates nominated by petition will be promptly disseminated or made available to the members by posting or other appropriate means and will be promptly forwarded to the Secretary of MC for mailing to the members in accordance with the MC Bylaws.<sup>26</sup>

Such nominees will be voted on by the regular and options principal members, and will be elected by a plurality of votes cast by these members.<sup>27</sup> Thereafter, MC will vote its

<sup>23</sup> See Article III, Section 2 of the Exchange Constitution.

<sup>24</sup> See Article III, Section 4 of the Exchange Constitution.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.* The time periods set forth above may be equitably adjusted by the Amex Nominating and Corporate Governance Committee with respect to the first election of Governors occurring following April 1, 2004, to facilitate a prompt initial election; provided, however, in no event shall the petition period described in the proceeding paragraph be less than 10 business days. See Article III, Section 5 of the Exchange Constitution.

<sup>27</sup> See Article III, Section 1 of the Exchange Constitution and Section 1.11 of the MC Bylaws. See also Section 8 of the MC Certificate of Incorporation. Specifically, at each meeting of the members for the election of directors of MC, Governors of the Exchange, Trustees, and Council Members, such persons shall be elected by a plurality of votes cast, in person or by proxy, at such meeting by the regular and options principal members voting together as a single class and MC, as the holder of the Class A Interest of the Exchange, shall vote such Class A Interest so as to cause the election of such persons who have been

<sup>13</sup> See Article II, Section 1(a)(1) of the Exchange Constitution.

<sup>14</sup> See *id.*

<sup>15</sup> See Article II, Section 1(a) of the Exchange Constitution.

<sup>16</sup> See Article II, Section 3 of the Exchange Constitution.

<sup>17</sup> See Article II, Section 1(d) of the Exchange Constitution.

<sup>18</sup> See Article II, Section 7 of the Exchange Constitution for a description of the Amex Adjudicatory Council.

<sup>19</sup> See Article IX of the Exchange Constitution for a description of the Gratuity Fund.

<sup>20</sup> See Article III, Sections 1 and 4 of the Exchange Constitution.

<sup>21</sup> See Section 1.14 of the MC Bylaws.

<sup>22</sup> See Article III, Section 3 of the Exchange Constitution.

Class A Participation Interest in the Exchange to elect those Governors, Council Members, and Trustees selected by the regular and options principal members.<sup>28</sup>

The Exchange contemplates a six-month transition period that will facilitate a phase-in of the new governance structure of the Exchange. Accordingly, immediately following the closing of the Transaction, the Board of Governors of the Exchange will form the initial Amex Nominating and Corporate Governance Committee, which will select nominees for Governor for the first election during the six-month transition period. By the end of the six-month transition period, the regular and options principal members of the Exchange will have elected a new Board of Governors from and among these nominees or any other candidates nominated by the members through petition. At the first election of the Exchange Board of Governors during the six-month transition period, eight of the fifteen Governors will be elected to an initial two-year term and the remaining seven Governors will be elected to an initial one-year term.<sup>29</sup> Thereafter, there will be an annual meeting for the election of Governors to succeed those Governors whose terms have expired.

The Constitution will require that each Governor, in exercising his or her powers and performing his or her duties, comply with the federal securities laws and the rules and regulations thereunder, cooperate with the Commission pursuant to its regulatory authority, and take into consideration the self-regulatory function of the Exchange, and the obligations of the Exchange (and his or her obligations) under the Act and the rules thereunder, including, without limitation, Section 6(b)<sup>30</sup> of the Act.<sup>31</sup>

## 2. Standing Committees of the Exchange

The Exchange Constitution will explicitly provide for a number of Standing Committees of the Exchange composed primarily or entirely of Independent Governors. Specifically,

the Exchange Constitution will provide for: (i) A Nominating and Corporate Governance Committee; (ii) an Executive Committee; (iii) an Audit Committee; (iv) a Regulatory Oversight Committee; and (v) a Compensation Committee.<sup>32</sup> Any power that has been delegated to any such Standing Committee may not be delegated to any other committee formed by the Exchange Board of Governors.<sup>33</sup>

### (i) Amex Nominating and Corporate Governance Committee

The Amex Nominating and Corporate Governance Committee will be appointed by the Exchange Board of Governors and will consist of three Governors, two of whom shall be Independent Governors and one of whom shall be the Membership Governor, as established by resolution adopted by a majority of the Board of Governors then in office.<sup>34</sup> Any vacancy in the Amex Nominating and Corporate Governance Committee will be filled by the Committee's remaining members, who will elect a Governor qualified to fill the vacancy.

The Amex Nominating and Corporate Governance Committee will, among other things: (i) Establish criteria and procedures for the nomination of Governors, Council Members, and Trustees; (ii) review the qualifications of and, when necessary and appropriate, interview candidates who may be proposed for nomination as, Governors, Council Members, and Trustees; (iii) submit to MC, in its capacity as the Class A Interests holder, a slate of nominees for the election of Governors, Council Members, and Trustees; (iv) monitor and consider the Exchange's corporate governance practices; (v) consider and make recommendations concerning the composition, organization, and functions of the Exchange Board of Governors; (vi) review periodically the performance of the Exchange Board of Governors; (vii) review periodically the Exchange Constitution; (viii) make periodic reports to the entire Exchange Board of

Governors on such matters within its powers and responsibilities as the Exchange Board of Governors may specify; and (ix) perform such other duties in connection with the selection or election of the Governors, Council Members, and Trustees or other corporate governance matters as the Exchange Board of Governors may request.

### (ii) Executive Committee

The Executive Committee will be appointed by the Exchange Board of Governors, upon the recommendation of the Amex Nominating and Corporate Governance Committee, and will consist of three to five Governors, at least a majority of whom will be Independent Governors and at least one of whom shall be an Industry Governor. The Executive Committee will have reasonable access during normal working hours to all information (including all books and records) respecting the Exchange and its assets. The Executive Committee, to the extent permitted by law, will have and may exercise, when the Exchange Board of Governors is not in session, all powers of the Exchange Board of Governors regarding the supervision of the management of the business and affairs of the Exchange.

### (iii) Audit Committee

The Audit Committee will be appointed by the Exchange Board of Governors, upon the recommendation of the Amex Nominating and Corporate Governance Committee, and will consist of three to five Independent Governors. The Audit Committee will: (i) Have the authority to consider the qualification of the Exchange's independent public accountants, make recommendations to the Exchange Board of Governors as to their selection and retention, and review and resolve disputes between such independent public accountants and management relating to the preparation of the annual financial statements; (ii) confer with the Exchange's independent public accountants to determine the scope of the audit that such accountants will perform; (iii) receive reports from the independent public accountants and transmit such reports to the Exchange Board of Governors, and after the close of the fiscal year, transmit to the Exchange Board of Governors the financial statements certified by such accountants; (iv) inquire into, examine and make comments on the accounting procedures of the Exchange and the reports of the independent public accountants; (v) consider and make recommendations to the Exchange Board of Governors upon matters

so elected by the regular and options principal members.

<sup>28</sup> See Section 8 of the MC Certificate of Incorporation and Section 1.11 of the MC Bylaws.

<sup>29</sup> The slate of initial eight Governors serving two-year terms and the initial Governors serving one-year terms shall consist of Independent Governors and Industry Governors in approximately equal proportions. The first year of each term will be extended or shortened depending upon whether the first election is held before or after July 1, 2004. See Article II, Section 1(d) of the Exchange Constitution.

<sup>30</sup> 15 U.S.C. 78f(b).

<sup>31</sup> See Article II, Section 3 of the Exchange Constitution and Amendment No. 4.

<sup>32</sup> See Article II, Section 6 of the Exchange Constitution.

<sup>33</sup> To establish the Standing Committees as described herein and facilitate the transition, Industry Governors may serve as members of the Standing Committees until the earlier of (i) the six-month anniversary of the closing of the acquisition by MC (or MC Acquisition Sub) of the Class Participation B Interest (the "Class B Interest Acquisition Closing Date") or (ii) the date of the election of the Board of Governors first succeeding the Class B Interest Acquisition Closing Date. See Article II, Section 1(f) of the Exchange Constitution.

<sup>34</sup> See Article II, Section 6(a) of the Exchange Constitution. The NASD Nominating Committee will cease to exist upon the closing of the Transaction.

presented to it by the officers of the Exchange pertaining to the audit practices and procedures adhered to by the Exchange; (vi) appoint the internal auditors of the Exchange; and (vii) make periodic reports to the entire Exchange Board of Governors on such matters within its powers and responsibilities as the Exchange Board of Governors may specify.

The internal auditors of the Exchange will report directly to the Audit Committee, and to the extent that such internal auditors are officers or employees of the Exchange, also to the Chief Executive Officer (or the Chief Executive Officer's Designee).<sup>35</sup> The internal auditors shall not be terminated without the advice and consent of the Audit Committee.

#### (iv) Regulatory Oversight Committee

The Regulatory Oversight Committee will be appointed by the Exchange Board of Governors, upon the recommendation of the Amex Nominating and Corporate Governance Committee, and will consist of three to five Independent Governors and one Industry Governor. The Independent Governors serving as members of the Regulatory Oversight Committee will be the only voting members of the committee. The Industry Governor serving as a member of the Regulatory Oversight Committee will be a non-voting member.

The Regulatory Oversight Committee will: (i) Have authority to determine the Exchange's regulatory scheme, programs, budget and staffing proposals annually; (ii) appoint and direct the Chief Regulatory Officer; (iii) advise the Compensation Committee with respect to and approve the compensation (or any change thereto) of the Chief Regulatory Officer; (iv) be responsible for assessing regulatory performance on a regular basis; (v) have the authority to recommend the adoption of rules to the Exchange Board of Governors concerning such matters as may be specified in the Regulatory Oversight Committee's charter; and (vi) make periodic reports to the entire Exchange Board of Governors on such matters within its powers and responsibilities as the Exchange Board of Governors may specify.

Upon consummation of the Transaction, the Chief Regulatory Officer will report directly to the

Regulatory Oversight Committee.<sup>36</sup> The Exchange Board of Governors will have the power to remove the Chief Regulatory Officer only with the advice and consent of the Regulatory Oversight Committee.

#### (v) Compensation Committee

The Compensation Committee will be appointed by the Exchange Board of Governors, upon the recommendation of the Amex Nominating and Corporate Governance Committee, and will consist of three to five Independent Governors. The Compensation Committee will have and may exercise all of the authority of the Exchange Board of Governors in administering the Exchange's management compensation plans, and will be responsible for, among other things: (i) Reviewing and approving performance goals relevant to the compensation of the Chief Executive Officer and evaluating the Chief Executive Officer's performance in achieving such goals, and recommending the compensation of the Chief Executive Officer to the Exchange Board of Governors; (ii) recommending to the Exchange Board of Governors the compensation of executive officers of the Exchange; (iii) causing to be publicly disclosed on an annual basis the compensation (and methodology behind such compensation) of the Governors and the five most highly compensated officers of the Exchange; and (iv) making periodic reports to the entire Exchange Board of Governors on such matters within its powers and responsibilities as the Exchange Board of Governors may specify.

#### 3. Other Committees

In addition to the Standing Committees, the Exchange Board of Governors by the affirmative vote of a majority of the entire Exchange Board of Governors may delegate such of its powers as it may from time to time determine, subject to the provisions of the Constitution and applicable law, to such committee or committees as the Exchange Board of Governors may from time to time authorize; provided, however, no such delegation may be made of any power described in the Exchange Constitution provisions concerning the responsibilities of the Amex Nominating and Corporate Governance Committee, the Executive Committee, the Audit Committee, the Regulatory Oversight Committee, and

the Compensation Committee.<sup>37</sup> Consistent with the foregoing, the Exchange Board of Governors may assign such authority and duties to the Chief Executive Officer and to other officers and employees of the Exchange in addition to those specified in the Constitution, as the Exchange Board of Governors may from time to time determine, subject to applicable law and the provisions of the Exchange Constitution.<sup>38</sup>

Under the Exchange Constitution, the Exchange Board of Governors will create and consult with the Seat Owners Advisory Committee ("SOAC"), consisting of representatives of various constituencies of the Exchange as SOAC shall deem appropriate.<sup>39</sup>

#### 4. Management

The officers of the Exchange shall include a Chief Executive Officer, Treasurer, Secretary, and Chief Regulatory Officer, and such other officers as the Chief Executive Officer, subject to the approval of the Exchange Board of Governors, may appoint.<sup>40</sup>

##### (i) Chief Executive Officer

The Chief Executive Officer will be selected by a majority of the Governors then in office. During his incumbency, the Chief Executive Officer shall have no affiliation with any member organization, or any other business interest proscribed by the Code of Conduct of the Exchange. The Chief Executive Officer shall be responsible to the Board of Governors of the Exchange for the management and administration of the affairs of the Exchange,<sup>41</sup> and will be a member of the Board of Governors. The Chief Executive Officer shall have such other powers and duties in the management of the Exchange as may be determined from time to time by the Exchange Board of Governors.

All salaried officers and employees of the Exchange shall be under the

<sup>37</sup> See Article II, Section 3 of the Exchange Constitution.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See Article II, Section 4 of the Exchange Constitution.

<sup>41</sup> The Chief Executive Officer, or such other officer as he may designate, shall prepare and present to the Board of Governors periodic reports concerning the finances, income and expenses of the Exchange, and prior to the beginning of each fiscal year of the Exchange shall present to the Board of Governors an estimate of the income of the Exchange and recommendations as to appropriations for expenses for such fiscal year. The Chief Executive Officer may at any time recommend additional appropriations or the increase or decrease of any appropriations made by the Board of Governors and shall make reports and recommendations to the Board of Governors as to the financial policy of the Exchange. See Article II, Section 4(a) of the Exchange Constitution.

<sup>35</sup> According to the Exchange, it is expected that, after the closing of the Transaction, the NASD will continue to provide the internal audit function services pursuant to a transition services agreement with the Exchange. Consequently, the internal auditors will not initially be the officers or employees of the Exchange.

<sup>36</sup> In Amendment No. 6, Amex revised Section 4(a) and Section 4(d) of Article II of the Amex Constitution to provide that the Chief Regulatory Officer would only report to the Regulatory Oversight Committee, and not to the Chief Executive Officer (or his designee).

direction of and responsible to the Chief Executive Officer or the Chief Executive Officer's designee; provided, however, that the Chief Regulatory Officer shall report only to the Regulatory Oversight Committee and the internal auditors also shall report directly to the Audit Committee.<sup>42</sup>

In the case of the absence or inability to act of the Chief Executive Officer, such other person as the Board of Governors may designate shall assume all the functions and discharge all the duties of the Chief Executive Officer. In the absence of such designation by the Board of Governors, the most senior ranking officer available shall assume all such functions and discharge all such duties of the Chief Executive Officer. In case a vacancy shall occur in the office of Chief Executive Officer, the Board of Governors, by the affirmative vote of a majority of the Governors then in office, shall fill such vacancy.

#### (ii) Chief Regulatory Officer

The Chief Regulatory Officer will be responsible for the management and administration of the regulatory functions of the Exchange and will be appointed by the Regulatory Oversight Committee.<sup>43</sup> The Chief Regulatory Officer will report directly to the Regulatory Oversight Committee. The Exchange Board of Governors will have the power to remove the Chief Regulatory Officer only with the advice and consent of the Regulatory Oversight Committee.

#### (iii) Other Officers

Subject to approval by the affirmative vote of a majority of the entire Board of Governors, the Chief Executive Officer may appoint such other officers of the Exchange, including, but not limited to, a President, Executive Vice President, Senior Vice President, and Vice President, as he may from time to time determine are required for the efficient management and operation of the Exchange, and subject to approval of a majority of the Board of Governors he shall appoint the Treasurer and the Secretary. The Chief Executive Officer shall fix the duties, responsibilities, terms and conditions of employment of officers and employees of the Exchange, other than those appointments or terms and conditions of employment that are within the power and responsibility of the Compensation Committee, the Regulatory Oversight Committee or the Audit Committee.

<sup>42</sup> See Article II, Section 4(d) and Article II, Section 6(c) of the Exchange Constitution.

<sup>43</sup> See *supra* discussion under Section II.C.2(iv) "Regulatory Oversight Committee."

#### *D. Matters Requiring Consent of MC or the Exchange Members*<sup>44</sup>

The Exchange Constitution will prohibit the Exchange, without MC's consent, from (i) selling, issuing, transferring or otherwise disposing of any limited liability company interest or other equity security of the Exchange or any notes or debt securities of the Exchange containing equity features, (ii) issuing any new trading privileges or material new rights to holders of existing privileges, or (iii) issuing additional memberships.<sup>45</sup> Any consent of MC requested by the Exchange to take such actions will only be granted by MC upon the affirmative vote of a majority of the regular memberships and the options principal memberships (voted as a single class) at a meeting duly called and convened and at which a quorum is present.<sup>46</sup> In addition, without the affirmative vote of a majority of regular and options principal members, neither MC nor any affiliate of MC, including MC Acquisition Sub, may sell, issue, transfer or otherwise dispose of any equity security of the Exchange or any notes or debt securities of the Exchange containing equity features.<sup>47</sup>

The Exchange Constitution will also provide that certain of its provisions may not be amended without the consent of the Board of Directors of MC. The provisions requiring consent from the board of MC to amend are:

- Article II, Section 1 (Classification of the Exchange Board of Governors);
- Article II, Section 6 (Standing Committees);
- Article III (Nomination and Election Procedures);

<sup>44</sup> See Article II, Section 8, Article IV, Section 1(j), and Article XIII, Section 1 of the Exchange Constitution and Sections 7, 8 and 9 of the MC Certificate of Incorporation.

<sup>45</sup> See Article II, Section 8 and Article IV, Section 1(j) of the Exchange Constitution.

<sup>46</sup> See Sections 7(a) and 9 of the MC Certificate of Incorporation. Upon receiving a written request from the Exchange for an amendment to the MC Certificate of Incorporation to authorize the issuance of additional memberships of any class, the Secretary of MC shall call a meeting of the holders of memberships entitled to vote thereat to vote on such request in accordance with the MC Bylaws. Such an amendment may be authorized, and such additional memberships may be issued, only upon the affirmative vote of a majority of the regular memberships and the options principal memberships voted (as a single class) at a duly convened meeting.

<sup>47</sup> See Section 7(b) of the MC Certificate of Incorporation. Under the proposal, unless otherwise required by statute, by the MC Certificate of Incorporation, or by the MC Bylaws, all matters submitted to a vote of the MC members shall be decided by the vote of a majority of the Members entitled to vote and present in person or by proxy at the meeting. See Sections 1.10 and 1.11 of the MC Bylaws.

• Article XIII, Sections 1 and 3 (Procedure, Adoption of Amendments Requiring the Consent of MC); and

• Any amendment to the Constitution that would result in a material change in the market structure or operations of the Exchange.

Other than the provisions above, the provisions of the Exchange Constitution may be amended or repealed, and new provisions may be adopted, only if approved by a majority of Governors then in office in accordance with the procedure as specified in Article XIII of the Exchange Constitution.

#### *E. Amex Adjudicatory Council*

The Amex Adjudicatory Council has the authority to act for the Board of Governors with respect to any appeal or review of a disciplinary hearing, a statutory disqualification proceeding, or a membership proceeding; any review of a written stipulation of facts and consent to penalty; the exercise of any exemptive authority; and such other proceedings or actions authorized by the rules of the Exchange.<sup>48</sup> The Amex Adjudicatory Council shall consist of six individuals, three of whom shall be Industry Governors ("Industry Council Members"), and three of whom shall be Independent Governors ("Independent Council Members").<sup>49</sup> All Council Members shall be nominated and elected in accordance with the procedures as described in Section II.C.1 ("Board of Governors") above.

In the event that a Council Member is precluded from participating in the Council's consideration of a particular matter due to a conflict of interest, the Board of Governors shall appoint a Governor within the same classification for the position to serve as a substitute for such Council Member with respect to the particular matter. In the event that a Governor fitting the relevant classification is not available to serve as a substitute, the Board of Governors may appoint a person who would be qualified to serve as a Governor within such classification (Industry Governor or Independent Governor). If a position on the Amex Adjudicatory Council becomes vacant, whether because of

<sup>48</sup> See Article II, Section 7(a) of the Exchange Constitution. The Amex Board of Governors has a discretionary right of review over matters within the purview of the Amex Adjudicatory Council.

<sup>49</sup> See Article II, Section 7(b) of the Exchange Constitution. Under the current Exchange Constitution, the Amex Adjudicatory Council consists of three floor governors (who spend a substantial part of their time on the floor of the Exchange) and three public governors (who are the representatives of the public (i) none of whom is, or is affiliated with, a broker or dealer in securities and (ii) all of them are nominated by the NASD Nominating Committee).

death, disability, disqualification, removal or resignation, the Board of Governors shall appoint a Governor within the same classification (Industry or Independent Council Member) to fill the vacancy until the next annual election of such Council members.<sup>50</sup>

#### *F. Amendments to the Exchange Constitution and the Exchange LLC Agreement*

The Amex Board would continue to be permitted to amend provisions of the Exchange Constitution by the affirmative vote of a majority of the entire Board, although, as noted above, the consent of MC's Board of Directors is needed to amend certain specified provisions of the Exchange Constitution.<sup>51</sup>

Any amendment to or repeal of any provision of the LLC Agreement shall not be effective until the same is filed with or filed with and approved by the Commission, under Section 19 of the Act<sup>52</sup> and the rules promulgated thereunder, as the case may be.<sup>53</sup>

#### *G. Amex Ownership and Control*

Any sale, issuance, transfer or other disposition in any single transaction or series of transactions of (A) any limited liability company interests or other equity security of the Exchange or any securities convertible into or exchangeable for, or options rights or warrants to acquire, any such equity securities or (B) any notes or debt securities containing equity features (including, without limitation, any notes or debt securities convertible into or exchangeable for any equity securities or containing profit participation features) shall: (i) Be made only in compliance with Sections 7(a) and 7(b) of the MC Certificate of Incorporation;<sup>54</sup> and (ii) be subject to

prior approval by the Commission pursuant to the rule filing procedure under Section 19 of the Act,<sup>55</sup> and the rules promulgated thereunder.<sup>56</sup> Any attempt to issue or transfer any such equity interests or any rights thereunder in violation of these provisions shall be null and void *ab initio*.<sup>57</sup>

In addition, any sale, issuance, transfer or other disposition in any single transaction or series of transactions of (A) any equity securities of MC or MC Acquisition Sub, or any securities convertible into or exchangeable for, or options rights or warrants to acquire, any such equity securities, or (B) any notes or debt securities containing equity features (including, without limitation, any notes or debt securities convertible into or exchangeable for any equity securities or containing profit participation features) shall be subject to prior approval by the Commission pursuant to the rule filing procedure under Section 19 of the Act<sup>58</sup> and the rules promulgated thereunder; provided that the foregoing shall not apply to any sale, transfer or other disposition of seats or membership interests of the MC.<sup>59</sup> Any attempt to issue or transfer such equity interest or any rights thereunder in violation of these requirements shall be null and void *ab initio*.<sup>60</sup>

#### *H. Corporate Governance and Structure of MC*

As detailed above, after the closing of the Transaction, MC will own 100% of the equity interests in the Exchange, and MC will continue to be a membership organization of which the members are the regular and options principal members of Amex. The MC Board of Directors will be elected by the members of MC and will consist of five persons who do not necessarily serve on the Exchange Board of Governors.<sup>61</sup>

with respect thereto, the request for such matter shall not be submitted again to the membership for a period of ninety days. See Sections 7(a) and 7(b) of the MC Certificate of Incorporation.

<sup>55</sup> 15 U.S.C. 78s.

<sup>56</sup> See Section 9.3 of the LLC Agreement.

<sup>57</sup> *Id.*

<sup>58</sup> 15 U.S.C. 78s.

<sup>59</sup> See Section 7(c) of the MC Certificate of Incorporation.

<sup>60</sup> *Id.*

<sup>61</sup> Under the MC Certificate of Incorporation, the purposes of MC continue to be: (i) Directly or indirectly holding, acquiring, exchanging, or disposing of equity or other interests in the Exchange and exercising the rights incident to its ownership; and (ii) to conduct and carry on only activities incidental to and in furtherance of the foregoing which may lawfully be conducted and carried on by a corporation of its type formed under the New York Not-for-Profit Corporation Law. See Section 3 of the MC Certificate of Incorporation.

#### 1. Board of Directors

The MC Board of Directors will consist of five directors elected by the members of MC in accordance with the MC Bylaws. The MC Board of Directors will be elected for one-year terms and will hold office until their successors are elected. No director of MC who has served eight consecutive elected terms as a director will be eligible for election as a director of MC except after an interval of two years; *provided, however*, that service on the Board of Directors prior to January 1, 1999 will not be taken into account for these purposes.<sup>62</sup> Unless otherwise required, each matter shall be decided by a vote of a majority of the directors present at the time of the vote, provided a quorum is present.<sup>63</sup> Vacancies on the MC Board of Directors may be filled for the remaining term of such vacant position by a majority vote of all remaining MC directors.<sup>64</sup> The MC Bylaws will also provide limitation of liability and indemnification for MC directors and officers.<sup>65</sup>

Under the MC Bylaws, all nominees for election as directors<sup>66</sup> will be selected by either (i) the MC Nominating Committee or (ii) by petition of the members of MC to the MC Nominating Committee.<sup>67</sup> The process is as follows:

The members of MC may propose nominees for directors of MC for consideration by the MC Nominating Committee by written submission filed with the Secretary of MC for delivery to the MC Nominating Committee not less than 12 weeks prior to the annual meeting of the members of MC. The eligibility of any candidate proposed in any such submission will be determined by the MC Nominating Committee in its sole discretion and without the right of appeal.

The MC Nominating Committee then will report to MC at least eight weeks prior to the date of the annual meeting of the members the names of candidates nominated by it as directors. Such report will be promptly disseminated or made available to members of MC by posting or other appropriate means and will be promptly forwarded to the

<sup>62</sup> See Section 2.03 of the MC Bylaws.

<sup>63</sup> See Section 2.13 of the MC Bylaws.

<sup>64</sup> See Section 2.06 of the MC Bylaws.

<sup>65</sup> See Article VIII of the MC Bylaws.

<sup>66</sup> The MC Bylaws also includes the nomination procedures for Exchange Governors, Council Members, and Trustees of the Exchange, as described above in Section II.C.1 ("Board of Governors").

<sup>67</sup> See Sections 1.13 of the MC Bylaws. Any person nominated by the MC Nominating Committee or by petition, whether or not such person is a Member, may be eligible to be elected to the MC Board of Directors.

<sup>50</sup> Under the current Exchange Constitution, the Board of Directors of MC was authorized to fill such vacancies.

<sup>51</sup> See Exchange Constitution Article XIII, Section 1.

<sup>52</sup> 15 U.S.C. 78s.

<sup>53</sup> See Section 11.3 of the LLC Agreement.

<sup>54</sup> Section 7(a) of the MC Certificate of Incorporation requires that the Exchange obtain the consent of MC in order to effect such sale, issuance, transfer or other disposition. MC, in turn, must obtain the approval of the regular and options principal members to grant such consent. Specifically, a majority of the regular and options principal members must approve any such sale, issuance, transfer or other disposition (voting as a single class). Section 7(b) of the MC Certificate of Incorporation provides that MC will be required to obtain the consent of the majority of the memberships entitled to vote in order for MC or an affiliate to transfer, sell or otherwise dispose of its or the affiliate's interest in the Exchange. If a proposed sale, issuance, transfer or other disposition of interest in the Exchange is not approved at the duly convened meeting convened



Secretary of MC for mailing to the members in accordance with the MC Bylaws.

The members of MC also may nominate candidates for directors of MC by written petition filed with the Secretary of MC for delivery to the MC Nominating Committee within three weeks after the dissemination of the report of the MC Nominating Committee. The eligibility of any candidate nominated in any such petition will be determined by the MC Nominating Committee. A statement of the candidates nominated by petition will be promptly disseminated or made available to members of MC by posting or other appropriate means and will be promptly forwarded to the Secretary of MC for mailing to the members within three days after the dissemination in accordance with the MC Bylaws.<sup>68</sup>

## 2. MC Nominating Committee

Under the MC Bylaws, the MC Nominating Committee will be appointed by the MC Board of Directors and will consist of two or three directors.<sup>69</sup> Any vacancy in the MC Nominating Committee will be filled by the Committee's remaining members, who will elect a person qualified to fill the vacancy.<sup>70</sup>

The MC Nominating Committee will: (i) Establish criteria and procedures for the nomination of MC directors; (ii) search for qualified nominees for submission to the members of MC for election; (iii) review the qualifications of and, when necessary and appropriate, interview candidates who may be proposed, or who are nominated by petition, as MC directors; (iv) submit to the members of MC a slate of nominees for the election of MC directors; (v) perform any and all other duties in connection with the selection, election, or termination of the MC directors as the MC Board of Directors may request; and (vi) make periodic reports to the entire Board of Directors on such matters within the Committee's powers and responsibilities as the Board of Directors may specify.<sup>71</sup>

<sup>68</sup> The time periods set forth above may be equitably adjusted by the MC Nominating Committee with respect to the first election of directors occurring following April 1, 2004, to facilitate a prompt initial election; provided, however, in no event shall the petition period described in the proceeding paragraph be less than 10 business days. See Section 1.13(g) of the MC Bylaws.

<sup>69</sup> See Section 3.03(a) of the MC Bylaws.

<sup>70</sup> See Section 3.03(b) of the MC Bylaws.

<sup>71</sup> See Section 3.03(a) of the MC Bylaws.

## I. Confidential Information and Books and Records

All books and records of the Exchange shall be kept in the United States.<sup>72</sup> All confidential information of the Exchange pertaining to the self-regulatory function of the Exchange, including all books and records of the Exchange reflecting such confidential information (including but not limited to regulatory investigations, examinations, disciplinary matters, and to the extent designated by the Exchange as confidential, trading data and trading practices) will be retained in confidence by each Governor, the Exchange and its personnel, and will not be used by each Governor, the Exchange and its personnel for any non-regulatory purposes and shall not be made available to any person (including, without limitation, any members of the Exchange) except that such confidential information may be disclosed: (i) To those personnel of the Exchange and to members of the Board of Governors of the Exchange to the extent necessary or appropriate to properly discharge the self-regulatory responsibilities of the Exchange; (ii) to the extent required by applicable statute, rule or regulation or any court of competent jurisdiction; and (iii) to the extent that such confidential information has become generally available publicly through no fault of the Exchange or its Governors, officers, employees or advisors.<sup>73</sup>

Also, all confidential information of Amex pertaining to the self-regulatory function of Amex, including books, minutes and records of Amex reflecting such confidential information (including but not limited to regulatory investigations, examinations, disciplinary matters, and to the extent designated by Amex as confidential, trading data and practices) which shall come into the possession of MC, the officers, directors, employees or agents of MC, shall be retained in confidence by MC and the officers, directors, employees and agents of MC and shall

<sup>72</sup> See Section 2.1 of the LLC Agreement. Likewise, all books and records of MC must be maintained in the United States. See Section 6.02 of the MC Bylaws.

<sup>73</sup> See Article II, Section 3 of the Exchange Constitution. In addition, this provision of the Constitution provides that confidential information of the Exchange shall be subject at all times to inspection and copying by the Commission, and that nothing in the Constitution should be interpreted as to limit or impede the rights of the Commission to access and examine such confidential information of the Exchange pursuant to the U.S. federal securities laws and the rules thereunder, or to limit or impede the ability of a Governor, the Exchange and its personnel to disclose such confidential information to the Commission.

not be used for any non-regulatory purposes.<sup>74</sup> MC shall take reasonable steps to ensure that its agents will comply with this provision.<sup>75</sup>

MC shall keep at the office of MC or such other locations within the United States as may from time to time be designated by its Board of Directors correct and complete books and records of account and minutes of the proceedings of its members, Board of Directors and committees, if any, and a list of the names, addresses, and classes of membership of the members.<sup>76</sup> To the extent that the foregoing books, minutes and records are related to the activities of the Exchange, such books, minutes and records shall be deemed to be the books, minutes and records of the Exchange for the purposes of Section 17(b) of the Act,<sup>77</sup> and shall be subject at all times to inspection and copying by the Commission and the Exchange.<sup>78</sup>

## J. Commission and Amex Jurisdiction

For so long as MC shall control, directly or indirectly, the Exchange, MC shall, and its officers, directors and employees by virtue of their acceptance of such position shall be deemed to, irrevocably submit to the exclusive jurisdiction of the United States federal courts, the Commission, and the Exchange, for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws, and the rules or regulations thereunder, arising out of, or relating to the activities of the Exchange, and MC shall, and by virtue of their acceptance of any such position, the officers, directors and employees of MC shall be deemed to, waive and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission as to such matters, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter

<sup>74</sup> See Section 16 of the MC Certificate of Incorporation and Section 7.08 of the MC Bylaws. Nothing in the MC Certificate of Incorporation or MC Bylaws shall be interpreted as to limit or impede the rights of the Commission or Exchange to access and examine such confidential information of the Exchange pursuant to the U.S. federal securities laws and the rules thereunder, or to limit or impede the ability of a Governor, the Exchange and its personnel to disclose such confidential information to the Commission.

<sup>75</sup> See *id.*

<sup>76</sup> See Section 12 of the MC Certificate of Incorporation and Section 6.02 of the MC Bylaws.

<sup>77</sup> 15 U.S.C. 78q(b).

<sup>78</sup> See Section 12 of the MC Certificate of Incorporation and Section 6.02 of the MC Bylaws.



thereof may not be enforced in or by such courts or agency.<sup>79</sup>

With respect to conduct by the officers and directors of MC that relates to the activities of the Exchange, such officers and directors shall be deemed to be the officers and directors of the Exchange solely for the purposes of the removal and censure authority of the Commission pursuant to Section 19(h)(4) of the Act.<sup>80</sup>

#### K. Cooperation With the Commission

For so long as MC shall control, directly or indirectly, the Exchange, MC shall, and the officers, directors and employees of MC by virtue of their acceptance of such position shall be deemed to, agree to cooperate with the Commission and the Exchange, in respect of the Commission's oversight responsibilities regarding the Exchange and the self-regulatory functions and responsibilities of the Exchange.<sup>81</sup> MC shall take reasonable steps to ensure that its agents similarly cooperate with the Commission.<sup>82</sup>

#### L. Additional Responsibilities of MC Officers and Directors

For so long as MC shall control, directly or indirectly, the Exchange, each officer, director and employee of MC shall give due regard to the preservation of the independence of the self-regulatory function of the Exchange and to the Exchange's obligations under the Act, and the rules thereunder, including, without limitation, Section 6(b) of the Act,<sup>83</sup> and shall not take any actions which he or she knows or reasonably should have known would interfere with the effectuation of any decisions by the Exchange Board of Governors relating to its regulatory functions (including disciplinary matters) or which would adversely affect the ability of the Exchange to carry out its responsibilities under the Act.<sup>84</sup>

#### M. Further Compliance

MC shall take reasonable steps to ensure that its officers, directors, and employees comply with Sections 12 (Books and Records), 13 (Officers and Directors), 14 (Consent to Jurisdiction), 15 (Cooperation with the Commission) and 16 (Confidential Information) of the

MC Certificate of Incorporation, and Sections 6.02 (Books and Records), 7.05 (Officers and Directors), 7.06 (Consent to Jurisdiction), 7.07 (Cooperation with the Commission) and 7.08 (Confidential Information) of the MC Bylaws, which shall include obtaining a written agreement from such individuals, as a condition to their initial or continued employment or service as a director, that they will comply with or consent to, as the case may be, such provisions.<sup>85</sup>

#### N. Amendments to the MC Certificate of Incorporation and MC Bylaws

Under the MC Certificate of Incorporation and the MC Bylaws, for so long as MC controls, directly or indirectly, the Exchange, before any change or addition to the MC Certificate of Incorporation or MC Bylaws shall be effective, the same shall be submitted to the Exchange Board of Governors, and if the Board shall determine that the same constitutes a "rule of an exchange" as such term is defined in the Act and the rules promulgated thereunder,<sup>86</sup> and must be filed with or filed with and approved by the Commission before the same may be effective, under Section 19 of the Act,<sup>87</sup> and the rules promulgated thereunder, then the same shall not be effective until filed with or filed with and approved by the Commission, as the case may be.<sup>88</sup>

#### O. Limitation on Distributions

The LLC Agreement will provide that no distribution to MC and MC Acquisition Sub, as participants of the Exchange, shall include revenues received by the Exchange from regulatory fines, fees or penalties.<sup>89</sup> Amex states that the purpose of this provision is to ensure that the regulatory authority of the Exchange is not used improperly to benefit the holders of the Exchange's LLC interests.

#### P. Transparency

In connection with the Transaction, both the Exchange and MC will adopt resolutions providing for greater transparency of their respective operations. Prior to each annual meeting at which Governors or directors, as the case may be, are elected, the Exchange and MC will distribute a proxy statement disclosing certain matters regarding each of their respective board's activities for the preceding year,

pertinent information about the independence of Governors and directors and compensation data for the Governors and five most highly compensated officers of the Exchange.

#### Q. Undertakings

In Amendment No. 6, Amex included certain Undertakings that are applicable to Amex. These Undertakings commit Amex to (1) not terminate Amex's current regulatory services agreement with NASD unless Amex has entered into an alternative arrangement for the provision of regulatory services that has been approved by the Commission, and to use its best efforts to comply with Amex's obligations under the current regulatory services agreement, (2) confer periodically with Commission staff regarding the status of Amex's regulatory program, and (3) submit certain financial information to the Commission.<sup>90</sup> The purpose of the Undertakings is to further ensure that the Exchange will be able to perform its regulatory responsibilities and that the Commission will have sufficient information to perform its regulatory function.

#### III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment Nos. 4 and 6, including whether these submissions are 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](mailto:rule-comments@sec.gov). Please include File Number SR-Amex-2004-50 on the subject line.

##### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-Amex-2004-50. 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

<sup>79</sup> See Section 14 of the MC Certificate of Incorporation and Section 7.06 of the MC Bylaws.

<sup>80</sup> 15 U.S.C. 78s(h)(4). See Section 13 of the MC Certificate of Incorporation and Section 7.05 of the MC Bylaws.

<sup>81</sup> See Section 15 of the MC Certificate of Incorporation and Section 7.07 of the MC Bylaws.

<sup>82</sup> See *id.*

<sup>83</sup> 15 U.S.C. 78f(b).

<sup>84</sup> See Section 13 of the MC Certificate of Incorporation and Section 7.05 of the MC Bylaws.

<sup>85</sup> See Section 17 of the MC Certificate of Incorporation and Section 7.09 of the MC Bylaws.

<sup>86</sup> See *infra* note 140.

<sup>87</sup> 15 U.S.C. 78s.

<sup>88</sup> See Section 18 of the MC Certificate of Incorporation and Section 9.01 of the MC Bylaws.

<sup>89</sup> See Section 4.6(c) of the LLC Agreement.

<sup>90</sup> See *supra* note 9.

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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the 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, as appropriate, to Amendment No. 4 and/or Amendment No. 6 of File Number SR-Amex-2004-50 and should be submitted on or before January 20, 2005.

#### IV. Discussion

The Commission has considered the Exchange's proposed rule change, as amended, and finds that, in the context in which it was submitted, the proposal is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>91</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(1) of the Act,<sup>92</sup> which requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules or regulations thereunder, and the rules of the Exchange. The Commission also finds that the proposal is consistent with Section 6(b)(3) of the Act,<sup>93</sup> in that the proposed amendments to the Exchange Constitution and other organizational documents are designed to assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the Exchange, broker, or dealer. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>94</sup> which requires, among other

things, that the rules of an exchange be designed to promote just and equitable principles of trade; to facilitate transactions in securities; to remove impediments to and perfect the mechanisms of a free and open market and a national market system; and, in general, to protect investors and the public interest.

The Commission discusses below significant aspects of the proposed rule change.

#### A. Exchange Governance Structure

As outlined below, the Commission generally believes that Amex's proposed changes should serve to strengthen and improve the Exchange's governance structure and are consistent with the Act. The Commission notes, however, that it is in the process of reviewing a range of governance issues relating to self-regulatory organizations ("SROs"), including possible steps to strengthen the framework for the governance of SROs and ways to improve the transparency of the governance procedures of all SROs and has proposed rules in furtherance of these goals.<sup>95</sup> Depending upon the results of the proposed rules, the Commission may determine that further measures are necessary to strengthen the governance of SROs. The Commission also believes that the Amex Board should continue to monitor and evaluate the Exchange's governance structure and processes on an ongoing basis, and propose further changes as appropriate.

#### 1. Board of Governors

The Exchange Constitution provides that within six months after the closing of the Transaction, the Exchange will transition to a fifteen member board consisting of nine Independent Governors and six Industry Governors.<sup>96</sup> The Commission believes that the proposal to implement a majority independent board should increase the Amex Board's ability to make judgments

in the best interests of the Exchange and investors.

The amended Constitution will prohibit an Independent Governor from: (i) Having a material business relationship with the Exchange, seat holders, or MC; (ii) being a director of a seat holder or AMC; or (iii) being employed, affiliated, or associated with members or lessors of memberships, and issuers listed on the Exchange.<sup>97</sup> The Commission believes that, with respect to governors, this definition of "independent" is an improvement on the Exchange's current definition of "public." In addition, the proposal requires the Board to designate an Independent Governor as the "Lead Governor" to preside over executive sessions of the Exchange Board of Governors if the Management Governor is designated as the Chairman of the Board of Governors.<sup>98</sup> The Exchange also will publicly disclose the Lead Governor's name and a means by which interested parties may communicate with the Lead Governor.<sup>99</sup> Also, the Commission notes that any quorum of Governors required to conduct the business of the Exchange shall include a number of Independent Governors at least equal to the number of Governors participating in any such meeting who are not Independent Governors.<sup>100</sup>

The Commission believes that these requirements, including the majority "independence" standard for the Board and the requirement that a Lead Governor be appointed if the Chairman and Chief Executive Officer are the same person, should benefit the Exchange by assuring that persons responsible for key decisions of the Exchange are free from material relationships with—and thus from the potential for improper influence by—the Exchange or the entities that the Exchange regulates.

Further, the Commission notes that the amended Constitution expressly requires that each Governor will, in exercising his or her powers and performing his or her duties, take into consideration the self-regulatory function of the Exchange, and the obligations of the Exchange (and his or

<sup>95</sup> See Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126 (December 8, 2004).

<sup>96</sup> See Article II, Section 1 of the Exchange Constitution. At the first election of the Exchange Board of Governors during the six-month transition period, eight of the fifteen Governors will be elected to an initial two-year term and the remaining seven Governors will be elected to an initial one-year term. The slate of initial eight Governors serving two-year terms and the initial Governors serving one-year terms shall consist of Independent Governors and Industry Governors in approximately equal proportions. Thereafter, there will be an annual meeting for the election of Governors to succeed those Governors whose terms have expired. All Governors elected at the annual meeting for the election of Governors will serve two-year terms and will hold office until their successors are elected.

<sup>97</sup> See Article II, Section 1(a)(1) of the Exchange Constitution and *supra* Section II.C.1 "Board of Governors."

<sup>98</sup> The Chairman of the Exchange Board of Governors may be the Management Governor or any Independent Governor. See Article II, Section 3 of the Exchange Constitution.

<sup>99</sup> If a Lead Governor has been designated by the Exchange Board of Governors, the Lead Governor will exercise the powers and discharge the duties of the Chairman in calling and presiding at meetings of the Exchange Board of Governors in the case of the absence or inability to act of the Chairman. See *id.*

<sup>100</sup> See *id.*, and Amendment No. 4.

<sup>91</sup> In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>92</sup> 15 U.S.C. 78f(b)(1).

<sup>93</sup> 15 U.S.C. 78f(b)(3).

<sup>94</sup> 15 U.S.C. 78f(b)(5).

her obligations) under the Act and the rules thereunder, including, without limitation, Section 6(b)<sup>101</sup> of the Act.<sup>102</sup> The Commission believes that this requirement should serve to remind Governors that they must consider the interests of all Exchange constituents and the requirements of the Act when taking actions on behalf of the Exchange.

## 2. Fair Representation

Section 6(b)(3) of the Act imposes specific obligations on the Amex as a registered national securities exchange to ensure that its members are fairly represented in the selection of its Governors and the administration of its affairs, and provide that one or more Governors shall be representative of issuers and investors and not be associated with a member of the Exchange, broker or dealer.<sup>103</sup> The Commission believes that the Amex's proposal is consistent with this requirement.

Under the proposal, one of the three members of the Amex Nominating and Corporate Governance Committee will be the Membership Governor. Amex members will vote for Board Governors and members of the Amex Adjudicatory Council<sup>104</sup> from those nominees selected by this Committee and any nominees selected by petition of the members.<sup>105</sup> The Executive Committee also will have at least 20 percent Industry Governor representation.<sup>106</sup>

The Commission thus believes that the Exchange's proposed corporate governance structure is consistent with Section 6(b)(3) of the Act.<sup>107</sup> The Commission also finds that the requirements that the Exchange Board of Governors have nine Independent Governors and also include a Governor representing listed companies are consistent with Section 6(b)(3) of the Act, which requires that one or more Governors be representatives of issuers and investors.<sup>108</sup>

## 3. Independence of the Regulatory Function and Key Committees

The Act requires registered exchanges to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and, subject to any applicable rule or order of the Commission, enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange.<sup>109</sup> An exchange's governance structure should be designed to assure that its regulatory function is strong, vigorous, and sufficiently independent and insulated from improper influence from management or any regulated entity. In the Commission's view, the proposed amendments to the Amex's governance and management structure are designed to advance this goal.

The Exchange Constitution provides for a Regulatory Oversight Committee, which will be composed of three to five Independent Governors and a non-voting Industry Governor. The Regulatory Oversight Committee will be responsible for, among other things, determining the Exchange's regulatory plan, assessing regulatory performance on a regular basis, recommending the adoption of rules to the Exchange Board concerning regulatory matters, and making periodic reports to the Exchange Board. The Amex also has proposed to create a Chief Regulatory Officer position. The Chief Regulatory Officer will be appointed by the Regulatory Oversight Committee and will report directly to that Committee.<sup>110</sup> The Exchange Board may remove the Chief Regulatory Officer only with the Regulatory Oversight Committee's advice and consent.

The Commission believes that these proposed amendments to Amex's governance structure, and in particular the creation of a Chief Regulatory Officer position reporting directly to an independent Regulatory Oversight Committee, add a significant degree of independence that should serve to insulate the Exchange's regulatory activity from economic pressures and potential conflicts of interest. The Commission believes that, in this context, the Exchange's proposal is consistent with the statutory requirements.

## 4. Committees

In addition, the proposed amendments to the Exchange Constitution provide for several key Board committees—called Standing

Committees—that have been delegated responsibility over critical Exchange operations, thus helping to ensure the transparency of those committees to the benefit of the Exchange and the investing public. The Commission notes that information about the functions of key Amex committees was previously not widely available or specified in the Exchange Constitution. The proposed amendments to the Constitution increase transparency with respect to several key committees and, thus, their accountability to the benefit of the Exchange and the investing public.

The Commission believes that the composition, duties, responsibilities, and guidelines assigned to each of these Standing Committees should help foster stronger and more independent governance of the Amex.<sup>111</sup> For example, the Amex Nominating and Corporate Governance Committee, which will be composed of three Governors, one of whom will be the Membership Governor and the rest of whom will be Independent Governors, will be responsible for establishing criteria and procedures for the nomination of Governors, Council Members, and Trustees, and interviewing and reviewing candidates for such positions. This Committee also will have the obligation to monitor the Exchange's corporate governance practices, consider and make recommendations concerning the composition, organization and functions of the Exchange Board, review the Exchange Constitution, and review periodically the performance of the Exchange Board. In the Commission's view, having a Committee with a majority of Independent Governors reviewing the Exchange's corporate governance practices and the performance of the Board should help improve the Exchange's governance process.

The Compensation Committee, which will be composed of three to five Independent Governors, will be responsible for reviewing and approving performance goals relevant to the compensation of the Chief Executive Officer, and for evaluating the Chief Executive Officer's performance in light of these goals, as well as recommending to the Board the compensation of the Chief Executive Officer and other executive officers. In addition, the requirement that the Committee make public annually the compensation of the Governors of the Exchange and the five

<sup>101</sup> 15 U.S.C. 78f(b).

<sup>102</sup> See Article II, Section 3 of the Exchange Constitution and Amendment No. 4.

<sup>103</sup> 15 U.S.C. 78f(b)(3).

<sup>104</sup> The Commission notes that the same process applies to the election of Trustees of the Exchange. Compare Article II, Section 7 with Article IX, Section 10 of the Exchange Constitution.

<sup>105</sup> See Article III, Section 4 of the Exchange Constitution.

<sup>106</sup> The Executive Committee will be comprised of three to five members, a majority of whom will be Independent Governors and at least one of whom will be an Industry Governor. See Article II, Section 6(b) of the Exchange Constitution.

<sup>107</sup> 15 U.S.C. 78f(b)(3).

<sup>108</sup> *Id.*

<sup>109</sup> 15 U.S.C. 78f(b)(1).

<sup>110</sup> See Amendment No. 6, *supra* note 9.

<sup>111</sup> The Commission also notes that the Amex Board will not be able to re-delegate to any other committee any power granted to a Standing Committee. See Article II, Section 6 of the Exchange Constitution.

most highly compensated officers of the Exchange should increase the transparency of this Committee's actions and improve accountability of the Exchange's most senior officers.

The Exchange also will have a fully independent Audit Committee that will have the authority to make recommendations to the Board as to the selection and retention of the Exchange's independent public accountants, and will appoint the internal auditors. The internal auditors will report directly to the Audit Committee and, to the extent they are officers or employees of the Exchange, to the Chief Executive Officer (or the Chief Executive Officer's designee), but cannot be terminated without the advice and consent of the Audit Committee. The Commission believes that the responsibilities assigned to the Amex's Audit Committee are appropriate, particularly with respect to the Audit's Committee's direct responsibility for assuring that the Amex retain suitable public accountants and appointing the Exchange's internal auditors.

#### 5. Improved Transparency

Finally, the Commission believes that the commitments by the Exchange and MC to adopt resolutions providing for greater transparency of their respective operations are important steps. Together with the revised governance structure and implementation of key Amex committees, such increased disclosure of the decision-making processes and the basis for Exchange and MC actions should benefit the Exchange, its constituencies, and investors.

#### B. Self-Regulatory Function of the Exchange

Upon the close of the Transaction, Amex will continue to be responsible for discharging its regulatory obligations under the Act, in particular Sections 6(b) and 19(g) of the Act.<sup>112</sup> Amex, however, will be wholly owned by MC, which will have a separate Board of Directors whose consent will be

required for Amex to take certain actions.<sup>113</sup> Certain provisions of the Amex Constitution, LLC Agreement, MC Certificate of Incorporation, and MC Bylaws are designed to facilitate the ability of Amex and the Commission to fulfill their regulatory obligations under the Act with respect to Amex.<sup>114</sup>

In particular, all confidential information of the Exchange pertaining to the self-regulatory function of the Exchange, including all books and records of the Exchange reflecting such confidential information will be retained in confidence by each Governor, the Exchange and its personnel. In addition, such confidential information will not be used by any Governor, the Exchange or its personnel for any non-regulatory purposes, and shall not be made available to any persons (including, without limitation, any members of the Exchange). Such confidential information may only be disclosed: (i) To those personnel of the Exchange and to members of the Board of Governors of the Exchange to the extent necessary or appropriate to properly discharge the self-regulatory responsibilities of the Exchange; (ii) to the extent required by applicable statute, rule or regulation or any court of competent jurisdiction; and (iii) to the extent that such confidential information has become generally available publicly through no fault of the Exchange or its Governors, officers, employees or advisors.<sup>115</sup>

All confidential information of Amex pertaining to the self-regulatory function of Amex, including books, minutes and records of Amex reflecting such confidential information (including but not limited to regulatory investigations, examinations, disciplinary matters, and to the extent designated by Amex as confidential, trading data and practices) which shall come into the possession of MC, the officers, directors, employees or agents of MC, shall be retained in confidence by MC and the officers, directors, employees and agents of MC and shall not be used for any non-regulatory purposes.<sup>116</sup>

Also, for so long as MC shall control, directly or indirectly, the Exchange, each officer, director and employee of MC shall give due regard to the preservation of the independence of the self-regulatory function of the Exchange and to the Exchange's obligations under the Act and the rules thereunder, including, without limitation, Section 6(b) of such Act,<sup>117</sup> and shall not take any actions which he or she knows or reasonably should have known would interfere with the effectuation of any decisions by the Board of Governors of the Exchange relating to its regulatory functions (including disciplinary matters) or which would adversely affect the ability of the Exchange to carry out its responsibilities under the Act.<sup>118</sup>

The Commission believes that these provisions, which are designed to help maintain the independence of Amex's self-regulatory function and protect from improper use confidential information pertaining to the self-regulatory function of the Exchange, are consistent with the Act.

The Commission also notes that no distribution made by the Exchange shall include revenues received by the Exchange from regulatory fines, fees or penalties.<sup>119</sup> The Commission finds that this prohibition is consistent with Section 6(b)(3) of the Act<sup>120</sup> because it will help to ensure that the regulatory authority of the Exchange is not used improperly to benefit the Exchange's owner(s).

#### C. Changes in Ownership and Control of Amex

Certain provisions of the proposed rule change require that any direct and indirect changes in ownership of the Exchange be subject to prior Commission review. The Commission believes that these restrictions, which are designed to prevent any owner from exercising undue control over the operation of Amex, are consistent with the Act.

In particular, any sale, issuance, transfer or other disposition of any equity security in Amex—including any LLC interest—is subject to prior approval by the Commission pursuant to the rule filing procedure under Section 19 of the Act,<sup>121</sup> and the rules promulgated thereunder.<sup>122</sup> Any

<sup>112</sup> 15 U.S.C. 78f(b) and 15 U.S.C. 78s(g). To assist the Exchange in fulfilling its regulatory responsibilities, Amex has entered into a regulatory services contract ("RSA") with NASD. The Commission notes that, under the terms of the RSA and consistent with the Amex's Constitution, any action taken by NASD, or its employees or authorized agents, acting on behalf of Amex pursuant to the RSA will be deemed to be an action taken by the Exchange. Importantly, however, Amex will retain ultimate legal responsibility for, and control of, its self-regulatory responsibilities. See Exchange Act Release No. 50122 (July 29, 2004), 69 FR 47962 (August 6, 2004) (approving an amendment to Article III, Section 2 of the Exchange Constitution permitting the Amex to enter into a regulatory services agreement with another self-regulatory organization).

<sup>113</sup> See *supra* discussion under Section II.D "Matters Requiring Consent of MC or the Exchange Members."

<sup>114</sup> The Commission notes that it is in the process of reviewing issues relating to new ownership structures of SROs, and has proposed rules relating to the ownership of SROs, including imposing limitations on member ownership of an SRO or facility of an SRO. See Securities Exchange Act Release No. 50699, *supra* note 95.

<sup>115</sup> See Article II, Section 3 of the Exchange Constitution. Also, the Exchange and MC will be required to keep all books and records in the United States. See Section 2.1 of the LLC Agreement and Section 6.02 of the MC Bylaws.

<sup>116</sup> See Section 16 of the MC Certificate of Incorporation and Section 7.08 of the MC Bylaws.

<sup>117</sup> 15 U.S.C. 78f(b).

<sup>118</sup> See Section 13 of the MC Certificate of Incorporation and Section 7.05 of the MC Bylaws.

<sup>119</sup> See Section 4.6(c) of the LLC Agreement.

<sup>120</sup> 15 U.S.C. 78f(b)(3).

<sup>121</sup> 15 U.S.C. 78s.

<sup>122</sup> See Section 9.3 of the LLC Agreement. Specifically, Section 9.3 provides that any sale,

attempt to issue or transfer any such equity interests or any rights thereunder in violation of these requirements shall be null and void ab initio. In addition, any sale, issuance, transfer or other disposition of any equity interest in MC or MC Subsidiary, other than the sale or transfer of seats or membership interests in MC, also shall be subject to prior approval by the Commission pursuant to the rule filing procedure under Section 19 of the Act,<sup>123</sup> and the rules promulgated thereunder, and any attempt to issue or transfer any such equity interests or any rights thereunder in violation of these requirements shall be null and void ab initio.<sup>124</sup>

Among other things, these provisions are designed to provide the Commission with the opportunity to determine what, if any, additional measures might be necessary to provide appropriate oversight of a proposed controlling person of Amex.

#### D. Regulatory Jurisdiction Over MC

Certain of the terms of the MC governing documents are designed to help enable the Commission to carry out its oversight responsibilities under the Act. Specifically, the MC Certificate of Incorporation and the MC Bylaws provide that, for so long as MC shall control, directly or indirectly, the Exchange, the books, minutes, and records of MC shall be deemed to be those of Amex for the purposes of Section 17(b) of the Act<sup>125</sup> to the extent that such books, minutes, and records are related to the activities of the Exchange.<sup>126</sup> Furthermore, MC's books and records will be subject to inspection and copying by the Commission and the Exchange.<sup>127</sup> Likewise, for purposes of the removal and censure authority of the Commission pursuant to Section 19(h)(4) of the Act,<sup>128</sup> the officers and

issuance, transfer or other disposition in any single transaction or series of transactions of (A) any limited liability company interests or other equity security of the Exchange or any securities convertible into or exchangeable for, or options rights or warrants to acquire, any such equity securities or (B) any notes or debt securities containing equity features (including, without limitation, any notes or debt securities convertible into or exchangeable for any equity securities or containing profit participation features) shall (i) be made only in compliance with the member vote procedures set forth in Section 7(a) of the MC Certificate; and (ii) be subject to prior approval by the Commission pursuant to the rule filing procedure under Section 19 of the Act, and the rules promulgated thereunder.

<sup>123</sup> 15 U.S.C. 78s.

<sup>124</sup> See Section 7(c) of the MC Certificate of Incorporation.

<sup>125</sup> 15 U.S.C. 78q(b).

<sup>126</sup> See Section 12 of the MC Certificate of Incorporation and Section 6.02 of the MC Bylaws.

<sup>127</sup> See *id.*

<sup>128</sup> 15 U.S.C. 78s(h)(4).

directors of MC shall be deemed to be officers and directors of Amex.<sup>129</sup>

Further, for so long as MC shall control, directly or indirectly, the Exchange, MC shall, and the officers, directors and employees of MC by virtue of their acceptance of such position shall be deemed to agree to cooperate with the Commission and the Exchange in respect of said Commission's oversight responsibilities regarding the Exchange and the self-regulatory functions and responsibilities of the Exchange.<sup>130</sup> MC shall take reasonable steps to ensure that its agents similarly cooperate with the Commission.<sup>131</sup>

The MC Certificate of Incorporation and the MC Bylaws also provide that, for so long as MC shall control, directly or indirectly, the Exchange, MC shall, and its officers, directors and employees by virtue of their acceptance of such position shall be deemed to, irrevocably submit to the exclusive jurisdiction of the United States Federal courts, the Commission, and the Exchange, for the purposes of any suit, action or proceeding pursuant to the United States Federal securities laws, and the rules or regulations thereunder, arising out of, or relating to the activities of the Exchange. In addition, MC shall, and by virtue of their acceptance of any such position, the officers, directors and employees of MC shall be deemed to, waive and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission as to such matters, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter thereof may not be enforced in or by such courts or agency.<sup>132</sup>

Pursuant to the MC Certificate of Incorporation and MC Bylaws, MC will take reasonable steps to ensure that its officers, directors and employees comply with various provisions of the MC Certificate of Incorporation, including the books and records, jurisdiction, confidential information, and cooperation provisions.<sup>133</sup> Such steps shall include obtaining from MC officers, directors and employees, as a condition to their initial or continued employment or service as a director, a

written commitment that they will comply with or consent to, as the case may be, such provisions.<sup>134</sup>

The Commission also notes that, even in the absence of these provisions of the MC Certificate of Incorporation and MC Bylaws, Section 20(a) of the Act<sup>135</sup> provides that any person with a controlling interest in the Exchange would be jointly and severally liable with and to the same extent that the Exchange is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act<sup>136</sup> creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder, and Section 21C of the Act<sup>137</sup> authorizes the Commission to enter a cease-and-desist order against any person who has been "a cause of" a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.

The Commission believes that, taken together, these provisions, which are designed to facilitate the ability of the Commission to exercise appropriate oversight over the Exchange and MC, are consistent with the Act.

#### E. Amendments to the Certificate of Incorporation and Bylaws of The Amex Membership Corporation

Section 19(b) of the Act<sup>138</sup> and Rule 19b-4 thereunder<sup>139</sup> require an SRO to file proposed rule changes with the Commission. Although MC is not an SRO, certain provisions of its Certificate of Incorporation and Bylaws may be rules of an exchange<sup>140</sup> if they are the stated policies, practices, and interpretations, as defined in Rule 19b-4 of the Act, of the Amex. Any proposed rule or any proposed change in, addition to, or deletion from the rules of an exchange must be filed pursuant to Section 19(b) of the Act and Rule 19b-

<sup>134</sup> See *id.*

<sup>135</sup> 15 U.S.C. 78t(a).

<sup>136</sup> 15 U.S.C. 78t(e).

<sup>137</sup> 15 U.S.C. 78u-3.

<sup>138</sup> 15 U.S.C. 78s(b).

<sup>139</sup> 17 CFR 240.19b-4.

<sup>140</sup> Section 3(a)(27) of the Act, 15 U.S.C.

78c(a)(27), defines the rules of an exchange to be the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing, of an exchange, and such stated policies, practices, or interpretations of such exchange as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange.

<sup>129</sup> See Section 13 of the MC Certificate of Incorporation and Section 7.05 of the MC Bylaws.

<sup>130</sup> See Section 15 of the MC Certificate of Incorporation and Section 7.07 of the MC Bylaws.

<sup>131</sup> See *id.*

<sup>132</sup> See Section 14 of the MC Certificate of Incorporation and Section 7.06 of the MC Bylaws.

<sup>133</sup> See Section 17 of the MC Certificate of Incorporation and Section 7.09 of the MC Bylaws.

4 thereunder.<sup>141</sup> Accordingly, Amex has filed the MC Certificate of Incorporation and MC Bylaws with the Commission.

#### V. Accelerated Approval of Amendment Nos. 4 and 6

Pursuant to Section 19(b)(2) of the Act,<sup>142</sup> the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice of filing thereof, unless the Commission finds good cause for so finding. The Commission hereby finds good cause for approving Amendment Nos. 4 and 6 to the proposed rule change prior to the thirtieth day after publishing notice of the same in the **Federal Register** pursuant to Section 19(b)(2) of the Act.<sup>143</sup>

Amendment No. 4 revises the first paragraph of Section 3 of Article II of the Exchange Constitution (Powers and Duties).<sup>144</sup> Specifically, Amendment No. 4 clarifies that Exchange Board members, among other things, would be required to take into consideration the self-regulatory function of the Exchange and the Exchange's obligations (and their obligations) under the Act. Because Amendment No. 4 simply clarifies the intent of the proposed rule, which has been noticed for public comment, the Commission believes that accelerating the effectiveness of Amendment No. 4 is consistent with the public interest and the protection of investors, and will not impose any significant burden on competition.

Amendment No. 6 revises Section 4(a) and Section 4(d) of Article II of the Exchange Constitution (Powers and Duties) relating to the Chief Regulatory Officer and set out certain undertakings applicable to Amex.<sup>145</sup> By amending the proposed rule to provide that the Chief Regulatory Officer will report only to the Regulatory Oversight Committee, and not, in addition, to the Exchange Chief Executive Officer (or Chief

Executive Officer's designee), Amendment No. 6 would effectively further increase the independence of the Chief Regulatory Officer. Amendment No. 6 also contains Undertakings pursuant to which Amex agrees to (1) not terminate Amex's current regulatory services agreement with NASD unless Amex has entered into an alternative arrangement for the provision of regulatory services that has been approved by the Commission, and to use its best efforts to comply with Amex's obligations under the current regulatory services agreement, (2) confer periodically with Commission staff regarding the status of Amex's regulatory program, and (3) submit certain financial information to the Commission. These proposals, which are designed to further ensure that the Exchange will be able to perform its regulatory responsibilities and to provide the Commission sufficient information to aid it in performing its regulatory oversight responsibilities, are consistent with the public interest and the protection of investors, and will not impose any significant burden on competition. Therefore, the Commission finds that good cause exists to accelerate approval of Amendment Nos. 4 and 6 to the proposed rule change, pursuant to Section 19(b)(2) of the Act.<sup>146</sup>

#### VI. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the Act and rules and regulations thereunder applicable to a national securities exchange.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>147</sup> that the proposed rule change, including Amendment Nos. 1, 2 and 3 thereto (SR-Amex-2004-50) be, and hereby is, approved, and that Amendment Nos. 4 and 6 thereto are approved on an accelerated basis. The proposed rule change shall be effective upon the closing of the Transaction described herein.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50919; File No. SR-MSRB-2004-09]

#### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Advertisements of Municipal Fund Securities Under MSRB Rule G-21

December 22, 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 December 16, 2004, the Municipal Securities Rulemaking Board ("MSRB" or "Board") 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 MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The MSRB has filed with the SEC a proposed rule change amending Rule G-21, on advertising, to establish specific requirements with respect to advertisements by brokers, dealers and municipal securities dealers ("dealers") relating to municipal fund securities. The MSRB proposes an effective date for the proposed rule change of the first calendar day of the month beginning 90 or more calendar days after SEC approval.

Below is the text of the proposed rule change. Proposed new language is in *italic*; proposed deletions are in brackets.

\* \* \* \* \*

#### Rule G-21. Advertising.

(a)-(c) No change.

(d) New Issue Advertisements. In addition to the requirements of section (c), all advertisements for new issue municipal securities (*other than municipal fund securities*) shall [also] be subject to the following requirements:

(i)-(ii) No change.

(e) *Municipal Fund Security Advertisements. In addition to the requirements of section (c), all advertisements for municipal fund securities shall be subject to the following requirements:*

<sup>141</sup> For so long as MC shall control, directly or indirectly, Amex, before any change or addition to the MC Certificate of Incorporation or MC Bylaws shall be effective, the same shall be submitted to the Board of Governors of the Exchange and if said Board shall determine that the same constitutes a "rule of an exchange" as such term is defined in the Act and the rules promulgated thereunder and must be filed with or filed with and approved by the Commission before the same may be effective, under Section 19 of the Act and the rules promulgated thereunder, then the same shall not be effective until filed with or filed with and approved by said Commission, as the case may be. See Section 18 of the MC Certificate of Incorporation and Section 9.01 of the MC Bylaws.

<sup>142</sup> 15 U.S.C. 78s(b)(2).

<sup>143</sup> *Id.*

<sup>144</sup> See *supra* note 7.

<sup>145</sup> See *supra* note 9 and Section II.Q.

<sup>146</sup> 15 U.S.C. 78s(b)(2).

<sup>147</sup> *Id.*

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

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