## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act of 1940, Release No. 25055/June 29, 2001]**

### Hillview Investment Trust II, Hillview Capital Advisors, LLC, 1055 Washington Boulevard, Stamford, Connecticut 06901, (812–12062); Order Pursuant to Section 6(c) of the Investment Company Act of 1940 Granting an Exemption From Section 15(a) of the Act and Rule 18f–2 Under the Act and Denying a Request for a Hearing

Hillview Investment Trust II (''Hillview Trust'') and Hillview Capital Advisors, LLC filed an application on April 14, 2000, and an amendment to the application on November 15, 2000, requesting an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from section 15(a) of the Act and rule 18f–2 under the Act. The requested order would permit Hillview Trust, an open-end investment company registered under the Act (''fund'') that would operate under an adviser/subadviser(s) structure described in the application, to enter into and materially amend subadvisory agreements without shareholder approval (''manager of managers exemptive relief'').

On February 6, 2001, a notice of the filing of the application was issued (Investment Company Act Release No. 24853). The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered.

On March 5, 2001, Fund Democracy, LLC (''Fund Democracy'') submitted a hearing request on the application (''Hearing Request''). Also on March 5, 2001, Institutional Shareholder Services (''ISS'') submitted a letter supporting the Hearing Request.

Rule 0–5(c) under the Act states that the Commission will order a hearing on a matter, upon the request of an ''interested person'' or upon its own motion, if it appears that a hearing is ''necessary or appropriate in the public interest or for the protection of investors.''

The Commission has reviewed the issues raised in the Hearing Request, which are summarized below.

Fund Democracy asserts that a fund that has only one subadviser should not be entitled to the manager of managers exemptive relief (*i.e.*, should not be able, among other things, to hire a new subadviser or reallocate fees between the adviser and the subadviser without shareholder approval). Fund Democracy also asserts that the conditions governing the manager of managers exemptive relief are insufficient to assure that funds relying on the relief hold themselves out to the public as operating pursuant to the manager of managers structure. The Hearing Request includes several examples of disclosures made by funds that have received the manager of managers exemptive relief that fund Democracy views as inadequate.

The Commission finds that these issues were considered and decided when the Commission granted manager of managers exemptive relief in *Frank Russell Investment Company, et al.*, Investment Company Act Release Nos. 21108 (June 2, 1995) (notice) (''Frank Russell Notice'') and 21169 (June 28, 1995) (order) (''Frank Russell Order''). Nearly 70 other orders granting manager of managers exemptive relief under the conditions established in the Frank Russell Order have been issued since 1995 (''Other Orders''). The Frank Russell Order and the Other Orders allow funds that utilize the manager of managers structure to avoid the costs and burdens associated with seeking shareholder approval of subadvisory agreements. The order requested by the Hillview Trust would be subject to conditions substantially identical to those in the Frank Russell Order and the Other Orders.

When we first granted manager of managers exemptive relief in the Frank Russell Order, we recognized that certain funds may employ subadvisers in a capacity similar to that of individual portfolio managers. The application for the Frank Russell Order stated that ''primary responsibility for management of the [f]unds, in particular, the selection and supervision of the [subadvisers], will be vested in the [advisers], subject to oversight and approval by the [f]unds' directors.'' [1] Under the terms and conditions of the Frank Russell Order and the Other Orders, the adviser was required to provide general management and administrative services to the fund and, subject to review and approval of the fund's board of directors, set the fund's overall investment strategies, select subadvisers, allocate the fund's assets among subadvisers, monitor and evaluate the performance of the subadvisers, and ensure that the subadvisers, comply with the fund's investment objectives, policies and restrictions.[2] In such an arrangement, irrespective of the number of subadvisers employed or the frequency with which subadvisers are changed, we determined that relief from the shareholder approval requirements in section 15(a) of the Act and rule 18f–2 under the Act for subadvisory agreements was appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.[3]

In the Frank Russell Order, we also specifically considered the advisory fee arrangement of a fund operating pursuant to a manager of managers structure. The Frank Russell Order and the Other Orders permit the adviser to allocate and reallocate advisory fees between itself and the subadviser(s), and among subadvisers, without a shareholder vote, provided that the aggregate advisory fee paid by the fund remains subject to approval by the shareholders, and subject to the other conditions in the Frank Russell Order and the Other Orders.

Finally, the Commission finds that the conditions set forth in the Frank Russell Order and the Other Orders are appropriate to assure that funds relying on the manager of managers exemptive relief adequately disclose to the public the manner in which these funds operate.

The Commission therefore finds that it has previously considered and decided the issues raised in the Hearing Request. Therefore, it appears that a hearing is not necessary or appropriate in the public interest or for the protection of investors.[4] Accordingly,

*It is ordered* that the request for a hearing is denied.

The matter having been considered, it is found, on the basis of the information set forth in the application, as amended, that granting the requested exemptions is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

*It is further ordered* that the requested exemption under section 6(c) of the Act

[1] Frank Russell Notice, applicants' legal analysis at paragraph 2.

[2] *Id.*, applicants' condition #8.

[3] Neither the terms nor the conditions of the Frank Russell order required the funds to use multiple subadvisers; instead, the applicants represented specifically that the adviser to the funds ''has engaged, or will engage, one or more subadvisers.'' Frank Russell Notice, applicants' representations at paragraph 3. The Frank Russell Order and the Other Orders similarly imposed no requirement that the subadvisers be changed with any frequency.

[4] The Commission does not deem it necessary to make a formal determination with respect to the status of Fund Democracy or ISS as an ''interested person'' within the meaning of section 40(a) of the Act and rule 0–5(c) under the Act inasmuch as the Commission has determined that the issues raised in the Hearing Request do not warrant a hearing.

from section 15(a) of the Act and rule 18f–2 under the Act is granted, effective immediately, subject to the conditions contained in the application, as amended.

By the Commission.

**Jonathan G. Katz,**

*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–44483; File No. SR–Amex–2001–40]**

## Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by American Stock Exchange LLC Relating to the Listing and Trading of Institutional Index Notes

June 27, 2001.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 12, 2001, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Annex. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving this proposal on an accelerated basis.

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

The Amex proposes to approve for listing and trading notes, the return on which is based upon an equal-dollar weighted portfolio of twenty securities chosen from the Amex Institutional Index pursuant to the methodology set forth below (the ''Institutional Holdings Index'').[3]

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

In its filing with the Commission, the Amex included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

(1) Purpose

Under Section 107A of the Amex Company Guide (''Company Guide''), the Exchange may approve for listing and trading securities which cannot be readily categorized under the listing criteria for common and preferred stocks, bonds, debentures, or warrants.[4] The Amex proposes to list for trading under Section 107A of the Company Guide notes based on the Institutional Holdings Index (the ''Institutional Holding Notes'' or ''Notes''). The Institutional Holdings Index will be determined, calculated and maintained solely by the Amex.[5]

The Institutional Holdings notes will conform to the initial listing guidelines under Section 107A[6] and continued listing guidelines under Sections 1001–1003[7] of the Company Guide. The Institutional Holdings Notes are senior non-convertible debt securities of Merrill Lynch & Co., Inc. (''Merrill Lynch''). The Notes will have a term of not less than one, nor more than ten years. The Institutional Holdings Notes will entitle the owner at maturity to receive an amount based upon the percentage change between the ''Starting Index Value'' and the ''Ending Index Value'' (the ''Redemption Amount''). The ''Starting Index Value'' is the value of the Institutional Holdings Index on the date the issuer prices the Institutional Holdings Notes for the initial sale to the public. The ''Ending Index Value'' is the value of the Institutional Holdings Index over a period shortly prior to the expiration of the Notes. The Ending Index Value will be used in calculating the amount owners will receive upon maturity. The Institutional Holdings Notes will not have a minimum principal amount that will be repaid and, accordingly, payments on the Institutional Holdings Notes prior to or at the maturity may be less than the original issue price of the Notes. During a two week period in the designated month each year, investors will have the right to require the issuer to repurchase the Institutional Holdings Notes at a redemption amount based on the value of the Institutional Holdings Index at such repurchase date. The Institutional Holdings Notes are not callable by the issuer.

The Institutional Holdings Notes are cash-settled in U.S. dollars and do not give the holder any right to receive a portfolio security or any other ownership right or interest in the portfolio of securities comprising the Institutional Holdings Index.

The Institutional Holdings Index will consist of twenty qualifying stocks (''Qualifying Stocks'') selected using the methodology presented below from the Amex Institutional Index (excluding utilities, if any, and the common stock of Merrill Lynch) which is a capitalization-weighted index of seventy-five (75) widely held stocks

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

[2] 17 CFR 240.19b–4.

[3] As of May 31, 2001, the portfolio of securities comprising the Institutional Holdings Index would be: Abbott Laboratories; American Home Products Corporation; Anheuser–Busch Companies, Inc.; Bank of America Corporation; The Bank of New York Company, Inc.; Bank One Corporation; The Boeing Company; Citigroup, Inc.: Colgate–Palmolive Company; Eli Lilly and Company; Emerson Electric Co.; Exxon Mobil Corporation; Federal Home Loan Mortgage Corporation; Federal National Mortgage Association; Microsoft Corporation; Minnesota Mining and Manufacturing Company; PepsiCo, Inc.; Philip Morris Companies Inc.; Tyco International Ltd.; United Technologies Corporation. The actual initial securities will be selected based on this methodology on a date specified in the prospectus supplement.

[4] *See* Securities Exchange Act Release No. 27753 (March 1, 1990), 55 FR 8626 (March 8, 1990) (order approving File No. SR–Amex–89–29) (''Hybrid Approval Order'').

[5] Subject to the criteria in the prospectus regarding the construction of the Institutional Holdings Index, the Exchange has sole discretion regarding changes to the Institutional Holdings Index due to annual reconstitutions and adjustments to the Institutional Holdings Index and the multipliers of the individual components.

[6] The initial listing standards for the Notes require: (1) A minimum public distribution of one million units; (2) a minimum of 400 shareholders; (3) a market value of at least $4 million; and (4) a term of at least one year. In addition, the listing guidelines provide that the issuer have assets in excess of $100 million, stockholder's equity of at least $10 million, and pre-tax income of at least $750,000 in the last fiscal year or in two of the three prior fiscal years. In the case of an issuer which is unable to satisfy the earning criteria stated in Section 101 of the Company Guide, the Exchange will require the issuer to have the following: (1) Assets in excess of $200 million and stockholders' equity of at least $10 million; or (2) assets in excess of $100 million and stockholders' equity of at least $20 million.

[7] The Exchange's continued listing guidelines are set forth in Sections 1001 through 1003 of Part 10 to the Exchange's Company Guide. Section 1002(b) of the Company Guide states that the Exchange will consider removing from listing any security where, in the opinion of the Exchange, it appears that the extent of public distribution or aggregate market value has become so reduced to make further dealings on the Exchange inadvisable. With respect to continued listing guidelines for distribution of the Notes, the Exchange will rely, in part, on the guidelines for bonds in Section 1003(b)(iv). Section 1003(b)(iv)(A) provides that the Exchange will normally consider suspending dealings in, or removing from the list, a security if the aggregate market value or the principal amount of bonds publicly held is less than $400,000.