

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49115; File No. SR-AMEX-2003-114]

### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC Concerning Its Pilot Program Governing Voting Procedures With Respect to Its Marketing Fee Program

January 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 29, 2003, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change relating to the voting procedures pilot program for its marketing fee program. On January 5, 2004 the Amex filed Amendment No. 1 to the proposed rule change, which replaces the original filing in its entirety. Amendment No. 1 to the proposed rule change is described in Items I and II below, which the Amex has prepared. The Commission is publishing this notice to solicit comments from interested persons on the proposed rule change, as amended. The Commission is also approving the proposal on an accelerated basis.

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

The Exchange proposes to expand the number of registered options traders that may be entitled to vote in connection with the marketing fee program as set forth in Commentary .11(a) of Rule 958. The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].

\* \* \* \* \*

#### Rule 958. Options Transactions of Registered Traders

(a) through (h) No Change  
Commentary

.01 through .10 No Change

.11 Marketing Fee Program Voting Procedures. The following procedures specify how a specialist and Registered Trader determine whether to participate or not to participate in the Exchange's marketing fee program. These procedures will expire six (6) months

from the date of effectiveness unless extended, or adopted on a permanent basis.

(a) Eligible Voters

(i) Eligible Registered Traders. For option classes traded by an individual specialist, Registered Traders to be eligible to participate in the vote must have transacted at least 80% of their contracts and transactions in each of the three immediately preceding calendar months in one or more option classes traded by that specialist. For cases when one specialist trades a single option class or multiple specialists trade a single option class, Registered Traders to be eligible to participate in the vote must have transacted at least 80% of their contracts and transactions in each of the three immediately preceding calendar months in that option class. *The calculation of the 80% requirement will include multiple option classes traded by multiple specialists provided: (i) The option classes are located in adjacent trading locations on the trading floor, and (ii) the ROT is continuously and without interruption signed onto Auto-Ex and/or Quick Trade in those particular options classes.* Registered Traders are required to continue to trade the particular option class at the time of the vote. Eligible Registered Traders and the specialist shall each have one vote.

(b) Requesting a Vote. After the marketing fee initially has been in effect for three consecutive calendar months with respect to the option classes of an individual specialist, any eligible Registered Trader and specialist can request that a vote be held to determine whether or not the Registered Trader and specialist should continue to participate in the marketing fee program by submitting a written request to that effect to the Secretary of the Exchange. The Exchange shall post a notice of the time and date of any vote to be taken at least 10 calendar days prior to the time of the vote. The Marketing Fee Program Committee shall determine all other administrative procedures pertaining to the vote.

(c) Participation in the Marketing Fee Program. The Registered Traders and specialist shall be deemed to have indicated that they desire to participate in the Exchange's marketing fee program if a majority of those eligible Registered Traders participate in the vote and if a majority of the total votes cast are in favor of participating in the marketing fee program. Conversely, the eligible Registered Traders and the specialist shall be deemed to have indicated that they do not desire to participate in the Exchange's marketing fee program if a majority of those eligible Registered

Traders participate in the vote and if a majority of the total votes cast are against participating in the marketing fee program.

(i) Frequency of Vote. Once eligible Registered Traders and the specialist vote to participate in the marketing fee program, subsequent votes to determine whether to continue participation may be held only once every three calendar months. Once eligible Registered Traders and the specialist vote not to participate in the marketing fee program, subsequent votes to determine whether to participate in the marketing fee program may be held only once every thirty days.

(ii) Tie Votes. If a vote conducted in accordance with this Commentary results in a tie, the status quo for the specialist and Registered Traders of the particular option class shall remain in effect. Accordingly, if the specialist and Registered Traders currently participate in the marketing fee program and a tie vote occurs, the marketing fee program will remain in effect for that specialist and Registered Traders. If the specialist and Registered Traders do not participate in the marketing fee at the time the tie vote occurs, the marketing fee will not be implemented for the specialist and Registered Traders at that time.

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

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

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

###### 1. Purpose

In June 2003, the Amex reinstated an equity option marketing fee on the transactions of specialists and registered options traders ("ROTs") involving customer orders from firms that accept payment for directing their orders to the Exchange.<sup>3</sup> On September 30, 2003, the

<sup>3</sup> See Securities Exchange Act Release No. 48053 (June 17, 2003), 68 FR 37880 (June 25, 2003) (SR-Amex-2003-50).

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

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

Exchange adopted new voting procedures, operative on a six-month pilot basis, in connection with its reinstatement of the marketing fee program.<sup>4</sup> The pilot program's voting procedures are set forth in Commentary .11 to Amex Rule 958. These procedures establish the voting eligibility requirements for ROTs and the manner in which ROTs may determine to discontinue their participation in the marketing fee program.

Currently, the Amex's marketing fee is assessed only on those specialist and ROT transactions resulting from orders from customers of payment accepting firms with whom the specialist has negotiated a payment for order flow arrangement.<sup>5</sup> The pilot program voting procedures provide that after the marketing fee program has been in effect for three consecutive calendar months with respect to those option classes traded by an individual specialist, the specialist and ROTs may determine to discontinue participation in the marketing fee program. To be eligible to vote on discontinuing participation in the marketing fee program in the option classes traded by an individual specialist, a ROT is required to have at least 80% of its registered trader activity in each of the three immediately preceding calendar months (measured in terms of both contract volume and transactions) in one or more of the options traded by that specialist. When one specialist trades a single option class or multiple specialists trade a single option class, to be eligible to vote on whether to continue with the marketing fee program, ROTs must have at least 80% of their registered trader activity in each of the three immediately preceding calendar months (measured in terms of both contract volume and transactions) in that option class.

The Exchange now believes that limiting eligibility to only those option classes traded by one specialist or one option class where multiple specialists trade such option class is overly restrictive and does not serve the interests of the marketing fee program. Although the pilot program voting requirements as originally filed were intended to assure the voting eligibility of only those ROTs that have concentrated their activity in one or more option classes traded by a specialist, the Exchange believes that the voting procedures have been unduly restrictive. The Exchange believes that

determining eligibility by looking at one specialist or one option class in the case of multiple specialists, in some circumstances, has prevented otherwise eligible ROTs from voting.

This proposal is intended to increase participation in the voting process for those ROTs that significantly concentrate their trading activity to particular option classes adjacent to each other that may have more than one individual specialist. For the purpose of determining whether option classes are adjacent, the Exchange asserts that trading locations must be directly next to each other.<sup>6</sup> It is not the Exchange's intention in this rule filing to provide those ROTs with insignificant trading activity in an option class or classes with the opportunity to vote against the marketing fee.

Accordingly, the Amex proposes that for purposes of determining ROT voter eligibility, the calculation of a ROT's 80% requirement would be expanded in the limited circumstances described below. First, the option classes must be in adjacent trading locations on the trading floor. Second, the ROT must be continuously signed on to Auto-Ex and/or Quick Trade in those particular options classes.<sup>7</sup> In order to vote, a ROT would still be required to meet the 80% contract volume and transaction requirement; however, the 80% requirement would be calculated based on the total trading activity of the ROT in multiple option classes. The Exchange believes that this would serve to increase ROT participation in the voting process to the benefit of the marketing fee program and the Exchange.

## 2. Statutory Basis

The Amex believes that the rule change is consistent with Section 6 of the Act,<sup>8</sup> particularly Section 6(b)(5) of the Act.<sup>9</sup> The Exchange believes that the

<sup>6</sup> For example, trading location 1 in the Western Row of Post 1 is adjacent to trading location 2 in the Western Row of Post 1. In addition, trading location 1 in the Western Row of Post 1 would also be adjacent to trading location 8 in the Western Row of Post 2 and trading location 7 in the Eastern Row of Post 12. However, trading locations 3 through 7 in the Western Row of Post 1 as well as trading location 1 in the Eastern Row of Post 13 would not be adjacent to trading location 1 in the Western Row of Post 1 (*i.e.*, to be adjacent, the trading locations must be directly next to each other).

<sup>7</sup> The period in which the ROT must be continuously signed on coincides with the three-month period used to determine whether the ROTs have at least 80% of their registered trader activity in that option class. Conversation between Jeff Burns, Associate General Counsel, Amex, and Elizabeth MacDonald, Attorney, Division of Market Regulation, Commission, January 12, 2004.

<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 15 U.S.C. 78f(b)(5).

proposed rule change is intended to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

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

The Amex does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

## C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

## III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the amended proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-AMEX-2003-114, and this file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments may be sent in hard copy or by e-mail, but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR-AMEX-2003-114 and should be submitted by February 19, 2004.

<sup>4</sup> See Securities Exchange Act Release No. 48577 (September 30, 2003), 68 FR 57943 (October 7, 2003) (SR-Amex-2003-80).

<sup>5</sup> See Securities Exchange Act Release No. 48053 (June 17, 2003), 68 FR 37880 (June 25, 2003) (SR-Amex-2003-50).

#### IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change as amended is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b)(5) of the Act.<sup>10</sup> The Commission believes that the proposed changes to the voting procedures pilot program would not significantly affect the protection of investors or the public interest, and would not impose any significant burden on competition.

The Amex has requested accelerated approval of its proposal to amend the marketing fee program voting procedures set forth in its six-month pilot program, which is due to expire as of March 30, 2004. According to the Amex, the proposal raises no novel issues and would merely expand ROT voter eligibility in connection with the Exchange's marketing fee program. Based upon the Amex's representations, the Commission finds good cause, consistent with Sections 6(b)(5) and 19(b)(2) of the Act,<sup>11</sup> to approve the proposed rule change as amended as a pilot program prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Commission believes that the proposed change to the marketing fee program voting procedures, as set forth in Commentary .11(a)(i) of Amex Rule 958, would help to provide greater access to and participation in the voting process for ROTs that have significant trading activity in those option classes that are subject to the marketing fee, and that are traded by multiple specialists in adjacent trading locations. The Exchange has tailored the proposal to provide specific criteria for determining eligibility to participate in the marketing fee program vote when multiple option classes are traded by multiple specialists. Accordingly, the Commission is approving, on an

accelerated basis, the proposed change to the marketing fee program voting procedures on a pilot basis to expire on March 30, 2004.<sup>12</sup>

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>13</sup> that the proposed rule change as amended to Commentary .11(a)(i) to Amex Rule 958 (SR-AMEX-2003-114) is hereby approved on an accelerated basis as a pilot program to expire on March 30, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49116; File No. SR-Amex-2003-111]

#### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the American Stock Exchange LLC Relating to Listing and Delisting Appeal Hearing Fees

January 22, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, as amended ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 12, 2003, 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 Exchange. 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 American Stock Exchange LLC ("Amex" or "Exchange") proposes to amend Sections 1203, 1204 and 1205 of the Exchange's *Company Guide* to increase the fees applicable to issuers requesting review of a determination to

<sup>12</sup>In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78s(b)(2).

<sup>14</sup> 17 CFR 200.30-3(a)(12).

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

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

limit or prohibit the initial or continued listing of their securities. The text of the proposed rule change is available at the Amex and at the Commission.

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

In its filing with the Commission, the 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 Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

###### 1. Purpose

Part 12 of the *Amex Company Guide* provides that issuers may request a written or oral review of a determination by the Listing Qualifications Staff to limit or prohibit the initial or continued listing of their securities before a Listing Qualifications Panel ("Panel") comprised of at least two, but generally three, members of the Amex Committee on Securities ("Committee"). The fee for a written review is \$1,500, and the fee for an oral hearing is \$2,500. Issuers may also request a review of a Panel decision by the Committee. The fee for such a review, which is conducted on the written record unless the Committee determines to hold oral hearings, is \$2,500.

The hearing fee structure was adopted in September 2001, and was intended to cover the cost of holding the hearing (*i.e.*, allocated staff and overhead costs as well as fees for court reporters, conference calls and other miscellaneous expenses).<sup>3</sup> Amex management believes that the fees should be increased at this time, because the allocated cost of staff and other resources necessary to prepare for and conduct listing hearings exceeds the current permitted fees, particularly in the case of delisting hearings that are often extremely complicated and contentious. Accordingly, the Amex proposes to increase the fee for Panel hearings to \$4,000 for a written hearing

<sup>3</sup> See Securities Exchange Act Release No. 44768 (September 6, 2001), 66 FR 47709 (September 13, 2001) (SR-Amex-2001-36).

<sup>10</sup> 15 U.S.C. 78f(b)(5). Section 6(b)(5) of the Act requires that the rules of a national securities exchange be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers."

<sup>11</sup> 15 U.S.C. 78f(b)(5) and 78s(b)(2).