

the securities is established currently for delivery at a future date.

*B. Payments of Dividends Out of Capital or Unearned Surplus*

AEP and the Nonutility Subsidiaries hereby request authority for the direct and indirect Nonutility Subsidiaries to pay dividends out of capital or unearned surplus to the fullest extent of the law, provided, however, that without further approval of the Commission, no Nonutility Subsidiary will declare or pay any dividend out of capital or unearned surplus if such Nonutility Subsidiary derives any material part of its revenues from the sale of goods, services or electricity to any Public Utility Subsidiary. In addition, the Nonutility Subsidiary will not declare any dividend out of capital or unearned surplus unless it:

- (i) Has received excess cash as a result of the sale of assets;
- (ii) Has engaged in a reorganization; and/or
- (iii) Is returning capital to an associate company.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-49617; File No. SR-Amex-2001-46]

**Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval to Proposed Rule Change Relating to the Adoption of a Facilitation Rule and Member Firm Guarantee for Index Shares**

April 26, 2004.

On July 11, 2001, 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 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt a facilitation rule and a member firm participation guarantee for member firms facilitating transactions in Portfolio Depository Receipts and Index Fund Shares ("index shares") on the Exchange, and to codify the Exchange's policy prohibiting the

use of non-public information received during the facilitation process.

On November 7, 2001, September 24, 2003, and December 4, 2003, Amex filed Amendment Nos. 1, 2, and 3 to the proposed rule change, respectively.<sup>3</sup> The proposed rule change was published for comment in the **Federal Register** on January 13, 2004.<sup>4</sup> The Commission received no comments on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>5</sup> In particular, the Commission believes that the proposed rule change is consistent with section 6(b)(5) of the Act,<sup>6</sup> which, among other things, requires that the Exchange's rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission believes that the proposal sets forth reasonable rules and procedures for member firms to follow when seeking to facilitate (*i.e.*, trade with) index share orders from their own public customers, and that these rules and procedures adequately provide for the exposure of the customer order to the trading crowd for the possibility of price improvement.

The proposal also would provide a member firm facilitating a public customer order of 25,000 index shares or more the right to trade with up to 50% of the order if the firm improves the price provided by the trading crowd, and up to 40% if it matches the trading crowd's price. The Commission believes that, in the context of index share trading, member firm guarantees of this size should not erode price competition to the detriment of investors. The Commission further notes that public customer orders on the specialist's book or represented in the trading crowd on the contra side of the public customer order that the member firm is seeking to

<sup>3</sup> See letter from Claire P. McGrath, Vice President and Special Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated November 5, 2001 (Amendment No. 1); and letters from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated September 23, 2003 and December 3, 2003 (Amendment Nos. 2 and 3, respectively).

<sup>4</sup> See Securities Exchange Act Release No. 49022 (January 5, 2004), 69 FR 2015 (January 13, 2004).

<sup>5</sup> In approving this proposed rule change, 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>6</sup> 15 U.S.C. 78f(b)(5).

facilitate would have priority over the member firm's guaranteed participation.

In addition, the proposed rule change provides that it may be considered conduct inconsistent with just and equitable principles of trade for any member or associated person with knowledge of an imminent facilitation transaction to trade in index shares that are subject of the transaction or other related instruments before the proposed facilitation is disclosed. The Commission believes that this aspect of the proposal should help protect the integrity of the market and prevent disadvantage to other market participants.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act<sup>7</sup>, that the proposed rule change (File No. SR-Amex-2001-46) be, and it hereby is, approved.

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

**Jill M. Peterson,**

*Assistant Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-49611; File No. SR-BSE-2004-10]

**Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the Boston Stock Exchange, Inc., and Notice of Filing and Granting Accelerated Approval to Amendment No. 1 To Permit the Separation of the Chairman and Chief Executive Officer Positions**

April 23, 2004.

**I. Introduction**

On March 2, 2004, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to amend its Constitution to permit the separation of the functions of Chairman and of Chief Executive Officer ("CEO"). The proposed rule change was published for comment in the **Federal Register** on March 17, 2003.<sup>3</sup> The

<sup>7</sup> 15 U.S.C. 78s(b)(2).

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

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

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

<sup>3</sup> See Securities Exchange Act Release No. 49434, 69 FR 13922 (March 24, 2004).

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

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

Commission received no comments on the proposal.

Subsequently, on April 14, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> In Amendment No. 1, the Exchange proposes several changes to the original filing. Amendment No. 1 clarifies the duties the Chairman and the CEO would perform when those positions are held by the same person or by different persons. Amendment No. 1 also incorporates a provision governing executive sessions of the Board, and bars the CEO from attending all such executive sessions and the Chairman from attending such executive sessions relating to personnel or compensation issues of the Chairman.

This order approves the proposed rule change, as amended; grants accelerated approval to Amendment No. 1; and solicits comments from interested persons on Amendment No. 1.

## II. Description of Proposed Rule Change

The BSE proposes to amend its Constitution to permit the separation of the Chairman and CEO positions. The separation would not be mandatory but, according to the Exchange, would be an option to be utilized by the Exchange's Board as deemed necessary and/or prudent to enhance the governance of the Exchange. The Exchange proposes the flexibility to separate the Chairman and CEO positions in the event the BSE's Board determines such a separation to be practical, in light of current or external events. The Exchange represents that any such separation also would allow for the independence of the Exchange's regulatory function from its marketplace function.<sup>5</sup>

To implement the possible separation of the two roles, the proposed changes to the BSE's Constitution would delineate the duties and functions of the Chairman and of the CEO in the event two individuals or the same individual should hold these positions. If the Chairman and CEO are not the same

person, then according to the proposed revisions to the Constitution, the Chairman, as an executive officer of the Exchange, among other duties, would: (1) Preside over all meetings of the Board; (2) be responsible to the Board for the management of the BSE's regulatory affairs; (3) be responsible for management of the regulatory affairs of all exchange facilities, subsidiaries, or other legal entities to which the Exchange is a party; and (4) act as Board liaison to the Exchange's CEO and management.<sup>6</sup> Similarly, if the Chairman and CEO positions are held by different individuals, then the CEO, among other duties, would: (1) Be responsible for the management and administration of the affairs of the Exchange's marketplace functions; (2) not participate in executive sessions of the Board; and (3) be subject to the authority of the Board.

If the Chairman and CEO are the same person, the proposal provides that the combined Chairman/CEO, among other duties, would: (1) Preside over all meetings of the Board; (2) be responsible to the Board for the management of the BSE's regulatory affairs; (3) be responsible for the management of the regulatory affairs of all Exchange facilities, subsidiaries, or other legal entities to which the Exchange is a party; (4) be responsible for the management and administration of the affairs of the Exchange's marketplace functions; and (5) be subject to the authority of the Board.

To further separate the CEO role from the regulatory functions of the Exchange, the Exchange also proposes that if a single individual serves as both the Chairman and CEO, the Board must designate a lead director to preside over executive sessions of the Board. The Chairman/CEO would not be permitted to participate in executive sessions of the Board. In addition, the Board would publicly disclose the lead director's name and a means by which interested parties may communicate with the lead director.

The Exchange further proposes to clarify when an executive session of the Board would be called. The Exchange proposes to add a provision to the Constitution noting that the Board will have the power to determine when to conduct proceedings in executive

session, and that executive session proceedings will be commenced for matters involving the regulation of the Exchange, the compensation of the Chairman, Exchange staff personnel matters, or any other matter that the Board determines to require confidential and sensitive treatment. The proposal requires that the Chairman recuse himself from any executive session proceedings involving personnel or compensation issues of the Chairman. Additionally, the CEO would not be permitted to attend any executive sessions of the Board.

## III. Discussion

The Commission has reviewed carefully the proposed rule change, as amended, and 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, the requirements of section 6(b) of the Act.<sup>7</sup> Specifically, the Commission finds that the proposed rule change, as amended, is consistent with section 6(b)(1) of the Act,<sup>8</sup> which requires that the exchange be "so organized and [have] the capacity to carry out the purposes of [the Act]." The Commission also finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act<sup>9</sup> in that it is designed, among other things to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and in general, to protect investors and the public interest.

In the Commission's view, the Exchange has taken an initial step toward strengthening its governance structure by providing itself with the flexibility to separate the functions of Chairman and CEO.<sup>10</sup> According to the Exchange, any such separation would allow for greater independence of the Exchange's regulatory function from its marketplace function. Although the Exchange has retained the ability to have the functions of Chairman and CEO reside in a single individual, the Commission notes that the Exchange's proposal has incorporated several features that are designed to help

<sup>4</sup> See letter from John Boese, Vice President, Legal and Compliance, BSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated April 13, 2004 ("Amendment No. 1"). Amendment No. 1 superceded and replaced the original filing in its entirety.

<sup>5</sup> The Exchange noted in its filing that it did not submit this proposal in response to any internal issues arising from its current governance structure. Rather, the Exchange stated that it sought to be proactive in concert with changes occurring in the control mechanisms of other market centers, particularly the New York Stock Exchange ("NYSE"). The Exchange noted that it was not implementing all of the changes recently put in place by the NYSE because the Exchange's size would make such a governance structure unwieldy and unworkable.

<sup>6</sup> The Exchange also proposes a Constitutional provision to clarify that the general powers of the Board also would include the administration of the regulatory function of the Exchange. Thus, while the person serving in the capacity of Chairman or Chairman/CEO would be responsible for the management of the Exchange's regulatory affairs, the Exchange's Board would continue to have ultimate oversight responsibility for the Exchange's regulatory functions.

<sup>7</sup> 15 U.S.C. 78f.

<sup>8</sup> 15 U.S.C. 78f(b)(1).

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

<sup>10</sup> The Commission is in the process of reviewing a range of governance issues relating to self-regulatory organizations ("SROs") and, depending on the results of that review, may determine further steps designed to strengthen the governance of SROs are necessary.

protect the integrity of the Exchange's regulatory function.

The Commission notes that the proposal sets forth the respective duties of the Chairman and the CEO in the event two individuals hold these positions. In this situation, the Exchange's proposal clarifies that the Chairman is responsible for the management of the BSE's regulatory function, while the CEO is responsible for the management and administration of the Exchange's marketplace function. In the Commission's view, the proposed rule change is designed to help improve the governance structure of the Exchange by ensuring that the Exchange's regulatory function is cordoned off from management of the marketplace function when two individuals hold the positions of Chairman and CEO.

In addition, the Exchange proposes to implement other revisions to its Constitution that are designed to reduce any potential conflicts of interest between its regulatory responsibilities and its marketplace functions, in the event a single individual holds the positions of Chairman and CEO. In this case, the Chairman/CEO would not be permitted to participate in Board executive sessions and a lead director would be appointed to preside over such sessions. Moreover, the Board must disclose the lead director's name and a means by which interested parties may communicate with the lead director. The proposed changes to the Constitution would require executive sessions to be commenced for matters involving the regulation of the Exchange, the compensation of the Chairman, Exchange staff personnel matters, or any other matter that the Board determines requires confidential and sensitive treatment. The Chairman would be recused from sessions involving personnel or compensation issues relating to the Chairman. The Commission believes that these additional safeguards proposed by the Exchange are designed to further the goal of independence of the Exchange's regulatory duties from its business functions.

In light of the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the Act.<sup>11</sup>

#### IV. Accelerated Approval of Amendment No. 1

The Commission finds good cause for approving Amendment No. 1 prior to

the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**.

Amendment No. 1 clarifies the proposed changes to the BSE's Constitution by setting forth expressly the duties of the Chairman and the CEO in the instances when those positions are held by the same individual or by two individuals. In addition, Amendment No. 1 incorporates provisions relating to executive sessions of the Board and specified that when the same individual serves as both Chairman and CEO, a lead director must be designated to preside over such sessions. Amendment No. 1 also specifies the kinds of matters, *i.e.*, the regulation of the Exchange, the compensation of the Chairman, Exchange staff personnel matters, or any other matter that the Board determines to require confidential and sensitive treatment, for which the Board must commence executive session proceedings. The proposed revisions in Amendment No. 1 were made for the purposes of clarifying the duties of Chairman and CEO, whether the same individual or two individuals hold those positions, and for clarifying the separation between the Exchange's regulatory and market functions.

Amendment No. 1 raises no new issues. Accordingly, the Commission finds good cause, consistent with sections 6(b)(1),<sup>12</sup> 6(b)(5)<sup>13</sup> and 19(b)(2)<sup>14</sup> of the Act, to accelerate approval of Amendment No. 1 to the proposed rule change.

#### V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether Amendment No. 1 is 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-BSE-2004-10 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-BSE-2004-10. 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 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 BSE. 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 to File Number SR-BSE-2004-10 and should be submitted on or before May 21, 2004.

#### VI. Conclusion

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>15</sup> that the proposed rule change (SR-BSE-2004-10) be, and it hereby is, approved, and that Amendment No. 1 to the proposed rule change be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>11</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>12</sup> 15 U.S.C. 78f(b)(1).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> 15 U.S.C. 78s(b)(2).

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

<sup>16</sup> 17 CFR 200.30-3(a)(12).