

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.