

permit unfair discrimination between customers, issuers, brokers and dealers.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition 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*

No written comments were solicited or received with respect to the proposed rule change.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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-Amex-2003-90 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-2003-90. 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 offices 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 to File Number SR-Amex-2003-90 and should be submitted on or before January 12, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-50871; File No. SR-Amex-2004-72]**

### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC To Amend Its Minor Rule Violation Plan**

December 16, 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 August 23, 2004, 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. On November 23, 2004, Amex filed Amendment No. 1 to the proposed rule

change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

Amex proposes to amend Exchange Rule 590, its Minor Rule Violation Fine Plan ("Plan"). The text of the proposed rule change is available at Amex's Office of the Secretary and at the Commission's Public Reference Room.

#### **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 Exchange included statements concerning the purpose of, and basis for, the proposed rule change, as amended, and discussed any comments it received. 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

The Exchange has had the Plan since 1976 which provides a simplified procedure for the resolution of minor rule violations. Codified in Amex Rule 590, the Plan has three distinct parts: Part 1 ("General Rule Violations") covers more substantive matters that, nonetheless, are deemed "minor" by Amex; Part 2 ("Floor Decorum") covers floor decorum and operational matters; and Part 3 ("Reporting Violations") covers the late submission of routine reports.

Amex is proposing to amend Part 1 of Amex Rule 590 to bring additional rules within its coverage. Amex believes that inclusion of such matters within Part 1 of Amex Rule 590 would provide a fair means of prompt resolution of minor rule violations that do not rise to the level of a formal enforcement action. Specifically, Amex is proposing to add the following violations to Part 1 of Amex Rule 590:

(i) Failure to comply with trade reporting requirements for options (Amex Rule 992 requires the member initiating the options transaction to report, or ensure the transaction is reported, within 90 seconds of the

<sup>10</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> Amendment No. 1 replaced the original proposed rule change in its entirety.

execution to be disseminated to the Options Price Reporting Authority).

(ii) Expand the current violation under the Plan where a specialist deactivates quote assist without proper authorization to include options (Amex Rules 950(g), Commentary .01 and 950-ANTE(g), Commentary .01).

(iii) Violation of Exchange rules regarding the Options Linkage program relating to the responding to, and receiving of, Linkage orders (Amex Rule 941(d) and (e)); avoidance and satisfaction of trade-throughs (Amex Rule 942(a)); and locked markets (Amex Rule 943).

(iv) Violation of the Exchange's policy with regard to affirmative determination of the availability for borrowing of shares of Amex-listed issues prior to effecting short sale transactions (Circular 90-25).<sup>4</sup>

(v) Effecting or causing to be effected a transaction outside of business hours through the Intermarket Trading System (Amex Rules 1, 100, and 233).

Amex also is proposing to amend and relocate Part 2(d)(3) of Amex Rule 590 (failure to submit option trade comparison data to the Exchange by specified deadlines) to Part 1(g) of Amex Rule 590. The proposed amendment would expand the requirement of reporting trade comparison data to include all transactions effected on the Exchange (presently, the rule only applies to options). Repositioning the above-mentioned violation would allow such behavior to be subject to Amex Enforcement Department action rather than Amex Floor Official action and also would increase the size of possible fines. The Exchange believes that inclusion of such matters within Part 1 of Amex Rule 590 would provide a fair means of prompt resolution of minor rule violations that do not rise to the level of a formal enforcement action.

As previously noted, Part 3 of Amex Rule 590, Reporting Violations, allows the specified departments of the Exchange that routinely receive regulatory reports from members and member organizations to issue abbreviated "written statements" to persons who may have violated the specified reporting rules, identifying the rules violated, the act or omission constituting the violation, and the amount of the fine. The fines are \$50 per day for each day the report is late. The Exchange is proposing to revise Part 3 of Amex Rule 590 to reflect the current filing schedule for the Form 50 (Short Position), which was previously only

required to be filed at or about mid-month but is now additionally required to be filed at or about the end of the month for selected derivative products.<sup>5</sup> The text of Part 3(g) of Amex rule 590 as it discusses Form 1-S (Round Lot Short Sales Transactions) is being corrected to reflect that the form is due on Friday rather than Thursday.<sup>6</sup>

## 2. Statutory Basis

Amex believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of Sections 6(b)(1),<sup>8</sup> 6(b)(6),<sup>9</sup> and 6(b)(7),<sup>10</sup> in particular, in that it would enhance the ability of the Exchange to 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; it would help ensure that members and persons associated with members are appropriately disciplined for violations of the Act, the rules and regulations thereunder, and the rules of the Exchange; and it would provide a fair procedure for disciplining members and persons associated with members.

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

Amex believes the proposed rule change, as amended, would impose no burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were solicited or received with respect to the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory

<sup>5</sup> See Amex Member Firm Regulation Informational Circular 98-0234 which pertains to Diamonds, SPDRS, MIDCAP SPDRS, and the various WEBS series known as iSHARES.

<sup>6</sup> See Amex Member Firm Regulation Informational Circular 97-597, which states that the Form 1-S will be due on the Friday following the week included in the report.

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

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

<sup>9</sup> 15 U.S.C. 78f(b)(6).

<sup>10</sup> 15 U.S.C. 78f(b)(7).

organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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-Amex-2004-72 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-2004-72. 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 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 offices of the Exchange. 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-Amex-2004-72 and should be submitted on or before January 12, 2005.

<sup>4</sup> See Securities Exchange Act Release No. 27542 (December 15, 1989), 54 FR 53222 (December 27, 1989) (SR-Amex-89-17).

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50874; File No. SR-CBOE-2004-66]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by Chicago Board Options Exchange, Incorporated Relating to Borrowing and Lending by Registered Persons

December 16, 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 October 18, 2004, the Chicago Board Options Exchange, Incorporated ("CBOE" 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 CBOE. 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

CBOE proposes to adopt a new rule restricting registered persons of members or member organizations from borrowing from or lending to their customers, except pursuant to the conditions specified in the rule. The text of the proposed rule change is available at the Office of the Secretary, CBOE, 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, CBOE 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 I above. CBOE 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

##### 1. Purpose

The purpose of the proposed rule change is to adopt a rule that prohibits registered persons of CBOE members or members organizations from borrowing money from or lending money to a customer unless each of the following applies: (1) The members or member organization has written procedures allowing such borrowing or lending arrangements; and (2) the borrowing or lending arrangement fall within one of five permissible types of lending arrangements.<sup>3</sup> In certain of these cases, the member or member organization must also pre-approve the loan in writing. The five types of permissible lending arrangements are:

(i) The customer is a member of the registered person's immediate family (as defined in the proposed rule);

(ii) The customer is a financial institution regularly engaged in the business of providing credit, financing, or loans, or other entity or person that regularly arranges or extends credit in the ordinary course of business;

(iii) The customer and the registered person are both registered persons of the same member organization;

(iv) The lending arrangement is based on a personal relationship outside of the broker-customer relationship; or

(v) The lending arrangement is based on a business relationship outside of the broker-customer relationship.

CBOE believes that the solicitation of loans from customers by registered persons is an area of legitimate CBOE interest because of the potential for misconduct. CBOE has brought disciplinary action against registered persons who have violated just and equitable principles of trade by taking unfair advantage of their customers by inducing them to lend money in disregard of the customers' best interests, or by borrowing funds from, but not repaying, customers. The potential for misconduct also exists when a registered person lends money to a customer.

The proposed rule change establishes a regulatory framework that would give members and member organizations greater control over, and mores specific

supervisory responsibilities for, lending arrangements between registered persons and their customers. Members and member organizations could choose to permit their registered persons to borrow from or lend to customers constituent with the requirements of the rule or, as was the case before the proposal of this new rule, prohibit the practice in whole or in part. If members or member organizations choose to permit their registered persons to engage in lending arrangements with customers, the proposed rule change would require members and member organizations to have written procedures allowing the borrowing and lending of money between registered persons and customers or the member or member organization. As stated above, members and member organizations would be permitted to approve loans only if the loan falls within one of the five types of permissible lending arrangements set forth in the rule.

The proposed rule would require members and member organizations to pre-approve in writing three out of five types of lending arrangements permitted by the rule. It would exempt from the rule's notice and approval requirements lending arrangements involving a registered person and his/her customer that is: (1) A member of his/her immediate family (as defined in the proposed rule); or (2) a financial institution regularly engaged in the business of providing credit, financing, or loans (or other entity or person that regularly arranges or extends credit in the ordinary course of business), provided the loan has been made on commercial terms that the customer generally makes available to members of the general public similarly situated as to need, purpose, and creditworthiness. The Exchange believes the requirement in the proposed rule that certain types of lending and borrowing arrangements must be pre-approved by the member or member organization would enhance members' and member organizations' ability to supervise such lending and borrowing activities of registered personnel.

CBOE also believes that, the proposed rule change would also enhance the Exchange's ability to monitor loans between registered persons and their customers. Currently, under controlling Commission decisions, to bring a disciplinary action against a registered person who has entered into an unethical lending arrangement with a customer, CBOE generally must prove that the arrangement is inconsistent with just and equitable principles of trade under CBOE Rule 4.1 because the registered person has acted in bad faith

<sup>3</sup> The proposed rule is substantially similar to NASD Rule 2370. See Securities Exchange Act Release No. 48424 (August 29, 2003), 68 FR 52806 (September 5, 2003). NASD Rule 2370 was amended in Securities Exchange Act Release No. 49269 (February 18, 2004), 69 FR 8718 (February 25 2004).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

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

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