SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45711; File No. SR–Amex–2001–74]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the American Stock Exchange LLC Relating to the Codification of Its Auto-Ex Policy and Calculation of the NBBO for Use in Auto-Ex

April 9, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 10, 2001, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which items have been prepared by the Exchange. Amex submitted Amendment No. 1 to the proposed rule change on January 31, 2002.[3] Amex submitted Amendment No. 2 to the proposed rule change on April 8, 2002.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, the Exchange: (1) Set forth in greater detail the proposed circumstances under which Auto-Ex can be disengaged or operated other than in the normal manner and the required documentation, and (2) proposed rule 933(d) which sets forth Amex's policy for determining that the quotes being disseminated by another options exchange are not reliable and excluding those quotes from the calculation of its NBBO. *See* letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Elizabeth King, Associate Director, Division of Market Regulation (''Division''), Commission, dated January 30, 2002 (''Amendment No. 1''). Amendment No. 1 supersedes and replaces the original filing in its entirety.

[4] In Amendment No. 2, the Exchange (1) Made several nonsubstantive corrections to its rule text; (2) set forth specific parameters for when Auto-Ex could be disengaged due to an influx of order executions; (3) revised the circumstances that Amex may rely upon in determining that the quotes being disseminated by another options exchange are not reliable and excluding those quotes from the calculation of its NBBO; (4) added language to clarify that the duration of the disengagement of Auto-Ex and the decision to reengage Auto-Ex will be documented; and (5) added language to clarify that the exclusion of an exchange or its quotes from the Auto-Ex determination of the NBBO will be reported to the regulatory authorities at the Exchange. *See* letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Elizabeth King, Associate Director, Division, Commission, dated April 1, 2002 (''Amendment No. 2'').

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

The Amex proposes to codify in Amex Rule 933 its practices and policies by specifying (i) the circumstances under which the Exchange's automatic execution system (''Auto-Ex'') can be disengaged or operated in a manner other than the normal manner set forth in Exchange rules and policies; (ii) the required documentation of the reasons for any actions to disengage Auto-Ex or to operate in a manner other than normal; and (iii) the circumstances under which Amex may determine that the quotes being disseminated by another options exchange are not reliable and exclude those quotes from the calculation of the National Best Bid or Offer (''NBBO''). Below is the text of the proposed rule change. Proposed new language is italicized.

Rule 933 Automatic Execution of Options Orders

(a) through (b) No change.

(c) (i) Auto-Ex may be disengaged or operated in a manner other than the normal manner in the following circumstances:

A. Temporary Disengagement of Auto-Ex During Market Data Delays—Senior Market Operations staff, in conjunction with the Floor Governors, may determine to disengage Auto-Ex due to market data dissemination delays at the Options Price Reporting Authority (''OPRA'') or internally at the Exchange. Auto-Ex may be disengaged for one option class, a group of option classes, or all option classes floor-wide;

B. Temporary Disengagement of Auto-Ex Pursuant to Unusual Market Exception—Pursuant to procedures set forth in Rule 958A(d), the Market Operations Division in consultation with a Floor Official may determine to disengage Auto-Ex if the Exchange is unable to accurately collect, process, and/or disseminate quotation data owing to the high level of trading activity or the existence of unusual market conditions which result in the suspension of firmquote rule obligations on the Exchange and its members and member organizations as set forth in Exchange Rule 958A(d) and Rule 11Ac1–1(b)(3) under the Securities Exchange Act of 1934;

C. Temporary Disengagement of Auto-Ex During Unusual Market Conditions—The Market Operations Division, with Floor Governor or Senior Supervisory Official approval, may disengage Auto-Ex during unusual market conditions in respect of an option class(es) or their underlying security(ies). Unusual market conditions may include (i) significant or market disruptive order imbalances in the option class or series, or the underlying security; or (ii) unusually wide or market disrupting spreads between the bid and the offer in the underlying security.

D. Temporary Disengagement of Auto-Ex as the Result of Systems Malfunctions—The Market Operations Division, with Floor Governor or Senior Supervisory Official approval, may disengage Auto-Ex as the result of systems malfunctions that affect the Exchange's ability to (i) disseminate or update market quotes; or (ii) deliver orders to the trading floor in a timely manner;

E. Automatic Disengagement of Auto-Ex Due to an Influx of Order Executions—In certain option classes, Auto-Ex may be disengaged when a specified number of automatic executions occur in that option class. The specialist in each options class has the discretion to determine whether to allow Auto-Ex to be automatically disengaged due to the influx of order executions and the number of automatic order executions that need to occur before Auto-Ex is automatically disengaged. The specialist must receive Floor Governor approval to set the number of automatic executions at one. Use of this feature does not relieve the specialist or registered options traders, as the responsible broker or dealer, from their obligations under Rule 958A and Rule 11Ac1–1 under the Securities Exchange Act of 1934. Once the disengagement occurs the specialist and the Exchange's Post Supervisor are notified immediately and Auto-Ex is generally re-engaged within one to five minutes. Any extended use of the by-pass feature will need Floor Official approval and must meet the standards for either a market data delay, an Unusual Market Exception, unusual market conditions or systems malfunctions; and

F. Automatic By-Pass of Auto-Ex in response to Certain Market Activity—Orders otherwise eligible for Auto-Ex may be by-passed during certain market situations and sent to the specialist for execution. Such situations include: (i) Whenever the bid or offer in a specific option series represents a limit order on the specialist's book; (ii) whenever a crossed or locked market causes an inversion in the quote; or (iii) whenever a better bid or offer is being disseminated by another options exchange and the order is not eligible for automatic price matching as set forth in Commentary .01(b);

(ii) In all situations set forth in (c)(i) above, the Exchange will document in either the Systems Support Log, or the Service Desk Log, any action taken to disengage Auto-Ex or to operate Auto-Ex in a manner other than normal, the action taken, the time of the action, the option class(es) affected, the identity of the Exchange or Floor official approving the action and a brief summary of the reason for the decision. Auto-Ex will generally be re-engaged when Market Operations determines that the cause of its disengagement has ceased. The Log(s) will indicate when Auto-Ex is re-engaged, if such re-engagement occurred during the same trading day. If no time of re-engagement is shown on the Log(s) that indicates Auto-Ex was disengaged for the remainder of the trading day. The Exchange will also document the reason for and the Exchange or Floor Official approving the re-engagement if such re-engagement was for a reason other than the cessation of the condition that led to the disengagement.

(d) On occasion the Amex must make the determination that the quotes being disseminated by another options exchange are not reliable and exclude those quotes from the calculation of its NBBO. A Floor Governor or Exchange Official may make this determination based on any of the following circumstances: (i) the other option exchange's quotes are not firm based upon direct communication from that exchange or the dissemination through OPRA of a message indicating the quotes are not firm; or (ii) the other options exchange has directly communicated or otherwise confirmed that it is experiencing systems or other problems affecting the reliability of its disseminated quotes. In all such cases the situation will be documented by the Market Operations staff and reported to the regulatory authorities at the appropriate exchange.

In all cases, where a Floor Governor or Exchange Official excludes an exchange or any of its quotes from the Auto-Ex determination of the NBBO due to quote unreliability, Market Operations staff will promptly notify the exchange of the action, continue to monitor the reliability of the excluded quotes in consultation with the Floor Governor or Exchange Official, and maintain records showing the date, time, duration, and reasons for each such action, as well as the identity of the Floor Governor or Exchange Official who authorized the action. Any determination to exclude a market or any of its quotes from the Auto-Ex determination of the NBBO pursuant to the above will expire at the end of the trading day, or at such time as the quotes are confirmed by the exchange to be reliable again—whichever occurs first. Exclusion of an exchange or its quotes from the Auto-Ex determination of the NBBO will be reported to Exchange member firms.

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

Auto-Ex provides the options investor with an important and useful tool in today's trading environment—an efficient means of obtaining a rapid, guaranteed execution of a market or marketable limit order. In addition, automatic executions have reduced the costs of trades generally and have enabled traders, specialists and the Exchange itself to better manage the tremendous volume of transactions that our markets now regularly experience. Auto-Ex is available in all option classes traded at the Exchange for public customer orders of up to 100 contracts. [5] Auto-Ex accounts for approximately 6.8% of the option volume executed on the Exchange and approximately 24.6% of the systems-delivered executed orders. To operate efficiently, Auto-Ex provides that all public customer market and marketable limit orders within the appropriate size parameters be executed at the prevailing best bid or offer with either the specialist or a registered options trader as the contra-party to the transaction. Since its implementation, the Exchange has developed certain policies regarding the use of Auto-Ex and the circumstances by which Auto-Ex may be disengaged or operated in a manner other than the normal manner. To ensure that actions taken to disengage Auto-Ex or to allow Auto-Ex to operate in other than the normal manner are done so in accordance with authority provided by Exchange rules, the Exchange has put in place specific procedures by which such actions must be taken and how such actions must be documented. Depending on the reason for the disengagement, the Exchange uses either the Systems Support Log or the Service Desk Log to document the action taken, the time of the action, the option class(es) affected, the identity of the Exchange Floor Official approving the disengagement and a brief summary of the reason for the decision. The Log(s) also indicate when Auto-Ex is re-engaged, if such re-engagement occurred during the same trading day. If the time of re-engagement is not shown on the Log(s) that indicates Auto-Ex was disengaged for the remainder of the trading day. The Exchange will also document the reason for re-engagement if such re-engagement was for a reason other than the cessation of the condition that led to the disengagement (*e.g.,* the Exchange determined to re-engage Auto-Ex even though an Unusual Market Exception to the firm quote rule continued to apply.) Members are kept fully apprised of actions taken with respect to Auto-Ex by announcements over the trading floor public address system, trading floor message boards and administrative messages via the Booth Automated Routing System (''BARS''). These detailed procedures together with the proper application of and notification to the membership when such actions are taken, demonstrate the Exchange's dedication to ensure that both members and investors are well informed about the operation of Auto-Ex and the circumstances when it may not be available.

It should be noted, however, the disengagement or by-passing of Auto-Ex does not mean that Auto-Ex eligible market or marketable limit orders fail to receive a timely and appropriate execution. Whenever Auto-Ex is disengaged or by-passed, orders are immediately routed by the Amex Order File (''AOF'') to the Amex Options Display Book (''AODB'') for execution. Within seconds, the market or marketable limit order is presented to the specialist and highlighted on the AODB screen. The specialist executes the order by simply ''clicking on it'' and the market or marketable limit order generally receives the same price or better (depending on the reason Auto-Ex

[5] Auto-Ex was initially approved in 1985 to allow orders of up to 10 contracts to be automatically executed. Over the years the Exchange has recognized that the order size for some option classes should be larger. The Exchange has obtained SEC approval to increase the order size for select option classes to 20, 50, 75 and most recently 100 contracts (*See* Securities Exchange Act Release No. 43660 (December 4, 2000) 65 FR 77942 (December 13, 2000)).

is bypassed) it would have received if executed on Auto-Ex. Indeed, the specialist and registered options traders, as the responsible broker or dealer, regardless of whether the order is automatically executed, continue to be obligated under the firm quote rule (Exchange Rule 958A) to execute the order at the disseminated quotation in an amount up to the published quotation size, except when an unusual market exception has occurred as defined in the Rule. It should also be noted, member firms that send orders to the Exchange and are charged with the responsibility of obtaining ''best execution'' for their customer orders are given on a monthly basis for each option class traded, a report indicating the average number of seconds it takes market and marketable limit orders to be executed on the Exchange. Thus, member firms are fully aware when making order routing decisions of the average time it takes to receive an execution on the Exchange for orders executed through Auto-Ex or the AODB.

The Exchange is now proposing to codify in Amex Rule 933(c) its current practices and policies by specifying (i) the circumstances under which Auto-Ex can be disengaged or operated in a manner other than the normal manner set forth in Exchange rules and policies; and (ii) the required documentation of the reasons for any actions to disengage Auto-Ex or to operate in a manner other than normal. The following are specific instances where Auto-Ex may be disengaged or operated in other than the normal manner.

Temporary Disengagement of Auto-Ex During Market Data Delays

The Exchange's Market Operations Division reviews on a case-by-case basis, in consultation with the Exchange's Floor Governors when deciding to disengage Auto-Ex due to market data delays either at the Options Price Reporting Authority (''OPRA'') or internally at the Amex. Market Operations can disengage Auto-Ex for one option class, a group of option classes, or all option classes floor-wide. Market data delays can include delays (i) in the Exchange disseminating quotations or last sale information to OPRA; (ii) in receiving information from OPRA to be displayed on the trading floor or used to calculate the best bid or offer; or (iii) in receiving market information regarding the underlying security. During the past year, market data delays have occurred infrequently due to significant improvements in OPRA's and the Exchange's message capacities and internal quote mitigation efforts. In previous years, when market data delays were more frequent, general guidelines were established by the Exchange's Floor Governors to assist senior Market Operations staff when making the decision to disengage Auto-Ex due to such a delay. Those guidelines are no longer in use; senior Market Operations staff together with the Floor Governors review each market data delay individually and make a determination to disengage Auto-Ex based on specific facts. Auto-Ex is generally re-engaged as soon as the market data delay has ended.

Disengagement of Auto-Ex due to market data delays is documented in each instance in the Systems Support Log. The Log notes the class(es) affected by the market data delay, time the disengagement started and ended, the reason for the determination and the Floor Governor(s) involved in the determination. If Auto-Ex is re-engaged during that trading day, the time of re-engagement is noted on the Log and if the re-engagement is for a reason other than the cessation of the market data delay, the reason is also noted in the Log.

Temporary Disengagement of Auto-Ex Pursuant to the Unusual Market Exception

Rule 11Ac1–1(b)(3) under the Act [6] and Exchange Rule 948A(d) (''Firm Quote Rules'') provide that if the Exchange determines that the level of trading activity or the existence of unusual market conditions is such that the Exchange is incapable of collecting, processing and making available quotation data in a manner that accurately reflects the current state of the market, the Firm Quote Rule obligations imposed on the Exchange and its member shall be suspended. The Market Operations staff in consultation with a Floor Official may determine to disengage Auto-Ex for the duration of the Unusual Market Exception. Documentation of this disengagement of Auto-Ex shall be maintained in either the Systems Support Log or the Service Desk Log depending on the cause of the unusual market condition. The Log notes the class(es) affected by the Unusual Market Exception, time the disengagement started and ended, the reason for the determination and the Floor Official involved in the determination. If Auto-Ex is re-engaged during that trading day, the time of re-engagement is noted on the Log and if the re-engagement is for a reason other than the cessation of the Unusual Market Exception, the reason is also noted in the Log.

Temporary Disengagement of Auto-Ex During Unusual Market Conditions or Systems Malfunctions

The Market Operations Division, with Floor Governor or Senior Supervisory Official approval, may disengage Auto-Ex during unusual market conditions in respect of an option class(es) or their underlying security(ies). Unusual market conditions may include (i) significant or market disruptive order imbalances in the option class or series, or the underlying security;[7] or (ii) unusually wide or market disrupting spreads between the bid and the offer in the underlying security. Documentation of the disengagement of Auto-Ex due to unusual market conditions is made in the Service Desk Log. With respect to systems malfunctions that affect the Exchange's ability to (i) disseminate or update market quotes; or (ii) deliver orders to the trading floor in a timely manner, senior Market Operations staff determines whether to disengage Auto-Ex. Documentation of the disengagement of Auto-Ex due to systems malfunctions is made in the Systems Support Log. Both documentation Logs indicate the class(es) affected, the reason(s) for the disengagement, approval by the appropriate official (with respect to disengagement for unusual market conditions) and the time the disengagement started and ended. If Auto-Ex is re-engaged during that trading day, the time of re-engagement is noted on the Log and if the re-engagement is for a reason other than the cessation of the Unusual Market Exception, the reason is also noted in the Log.

Automatic By-pass of Auto-Ex Due to an Influx of Order Executions

In certain option classes (generally the less active classes) the Exchange allows Auto-Ex to be by-passed when a specified number of automatic executions in that option class occur. The specialist determines the number of executions that can occur before this by-pass feature is activated. The specialist's determination depends on a number of factors, such as the volatility of the underlying security and amount of activity in the option class or series. However, in order to set the number of automatic executions at one, the

[6] 17 CFR 240.11AC1–1(b)(3).

[7] Pursuant to Exchange Rules 958A and 115 and New York Stock Exchange Rule 60, at 3:40 p.m. each trading day order imbalances are required to be publicly announced. On occasion, these order imbalances are significant and may necessitate the disengagement of Auto-Ex.

specialist must receive the approval of a Floor Governor. Use of this feature does not relieve the specialist or registered options traders, as the responsible broker or dealer, from their obligations under Rule 958A and Rule 11Ac1–1 under the Securities Exchange Act of 1934. Once the disengagement occurs the specialist and Post Supervisor are notified immediately and Auto-Ex is generally turned back on shortly thereafter. Any extended use of the by-pass feature will need Floor Official approval and must meet the standards for either a market data delay, an Unusual Market Exception, unusual market conditions or systems malfunctions. Pursuant to the firm quote rule (Rule 958A(c)(ii)), the responsible broker or dealer, when in the process of effecting a transaction in an option class or series, is not obligated to execute a transaction when he has revised or is in the process of revising the bid, offer or quotation size. This by-pass feature provides the responsible broker or dealer with the ability to react to automatic executions in the option series or class by allowing the responsible broker or dealer to execute the order, if appropriate under the firm quote rule, at the revised bid or offer or in the amount of the revised quotation size.

It should be noted that when Auto-Ex is by-passed or disengaged in this and other situations, all orders that would have otherwise been executed by Auto-Ex (market and marketable limit orders within the size parameters) are sent directly to the Amex Options Display Book (AODB) for execution by the specialist. As discussed above the by-passing of Auto-Ex in this (and other) situations does not mean that Auto-Ex eligible market or marketable limit orders fail to receive a timely and appropriate execution. The Exchange, on a monthly basis, submits to each firm executing options trades on the Exchange a report, which indicates on a class by class basis extensive information regarding the execution of orders including the average number of seconds it takes an order sent through the electronic order routing systems to receive an execution. Members use these reports to determine whether they are meeting their ''best execution'' obligations. The Exchange believes that the information included in this report is a more useful barometer of execution quality than information indicating that Auto-Ex may be by-passed in certain situations and executed through the AODB.

The Exchange is currently developing a system to document each situation when the automatic by-pass was activated and a monthly print-out of each situation will be kept by the Post Supervisor and the Market Operations Division. This information will be made available to the Trading Analysis Division to monitor appropriate use of this by-pass feature.

Automatic By-Pass of Auto-Ex in Response to Certain Market Activity

The automatic by-pass feature provides in certain market situations for orders that are otherwise eligible for Auto-Ex to by-pass Auto-Ex and be sent to the AODB for execution handling by the specialist. Auto-Ex is by-passed in the following situations: (i) Whenever the bid or offer in a specific option series represents a limit order on the specialist's book; (ii) whenever a crossed or locked market causes an inversion in the quote; (iii) whenever a better bid or offer is being disseminated by another options exchange;[8] and (iv) whenever a registered options trader or a floor broker on behalf of a customer order improves the quotation[9]. AOF, the Exchange's host order processing system, keeps a record of each instance an otherwise eligible Auto-Ex order by-passes Auto-Ex and is sent to the AODB for execution by the specialist. This information is used by the Trading Analysis Division to monitor appropriate use of this by-pass feature.

Calculation of the NBBO for Use in Auto-Ex

As discussed above, for Auto-Ex to operate efficiently and effectively, all market data must be received in a timely manner, including market data received from other options exchanges multiply trading a particular option class. Although there is currently no rule at the Amex or at any of the other options exchanges prohibiting the trading through of a better market away,[10] the Amex has committed to its membership and investors, that it will not automatically execute an order if a better market is being disseminated elsewhere. In order to determine whether such a better market away exists, the Amex must collect reliable market data from the other options exchanges in order to calculate the National Best Bid or Offer (''NBBO''). On occasion the Amex must make the determination that the quotes being disseminated by another options exchange are not reliable and exclude those quotes from the calculation of its NBBO. A Floor Governor or Exchange Official may make this determination based on one of the following circumstances: (i) The other options exchange's quotes are not firm based upon direct communication from that exchange or the dissemination through OPRA of a message indicating the quotes are not firm; or (ii) the other options exchange has directly communicated or otherwise confirmed that it is experiencing systems or other problems affecting the reliability of its disseminated quotes.

In all cases where a Floor Governor or Exchange Official excludes an exchange or any of its quotes from the Auto-Ex determination of the NBBO due to quote unreliability, Market Operations staff will promptly notify the exchange of the action, continue to monitor the reliability of the excluded quotes in consultation with the Floor Governor or Exchange Official, and maintain records showing the date, time, duration, and reasons for each such action, as well as the identity of the Floor Governor or Exchange Official who authorized the action. Any determination to exclude a market or any of its quotes from the Auto-Ex determination of the NBBO will expire at the end of the trading day, or at such time as the quotes are confirmed by the exchange to be reliable again '' whichever occurs first. Exclusion of an exchange or its quotes from the Auto-Ex determination of the NBBO will be reported to Exchange member firms.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,[11] in general and furthers the objectives of Section 6(b)(5),[12] in particular, because it is designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade.

[8] In February 2001, the Exchange received Commission approval to eliminate the Auto-Ex by-pass feature in certain circumstances. *See* Securities Exchange Act Release No. 44013 (February 28, 2001), 66 FR 13816 (March 7, 2001). Commentary .01 to Amex Rule 933 now provides for matching of the best bid or offer displayed by a competing market by allowing customer market and marketable limit orders to be automatically executed at that best bid or offer provided it is within the specified number of trading increments or ticks of the Amex's displayed bid or offer, and the order is within the established order size parameters. Thus, orders will no longer by-pass Auto-Ex when they can be automatically executed at the better bid or offer being disseminated by another options exchange.

[9] *See* File No. SR-Amex–2002–09, a proposed rule change pending before the Commission.

[10] As part of the implementation of the permanent Options Intermarket Linkage, a uniform trade-through rule has been proposed by the participating options exchanges and was filed by Amex with the Commission on August 8, 2001. *See* SR–Amex–2001–64.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

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.

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 Exchange 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. 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–2001–74 and should be submitted by May 6, 2002.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45704; File No. SR–NASD–2001–69]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the National Association of Securities Dealers, Inc. Amending NASD Rule 4720 Relating to the Inclusion of UTP Exchanges in the Nasdaq National Market Execution System

April 8, 2002.

I. Introduction

On October 5, 2001, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, the Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b-4 thereunder,[2] a proposed rule change amending NASD Rule 4720, SelectNet Service, relating to the inclusion of exchanges trading Nasdaq securities pursuant to unlisted trading privileges (''UTP Exchanges'') in the Nasdaq National Market Execution System (''NNMS''). On December 19, 2001, the NASD submitted Amendment No. 1 to the proposed rule change.[3] On January 16, 2002, the NASD submitted Amendment No. 2 to the proposed rule change.[4] The proposed rule change, as amended, was published for comment in the **Federal Register** on January 28, 2002.[5] The Commission received two comments on the proposal.

II. Description of the Proposal

In SR–NASD–2001–69, Nasdaq is proposing to amend NASD Rule 4720 to specify that a UTP Exchange will be permitted access to SelectNet on a basis similar to that which is offered to NASD members. As a result, SelectNet will be available only in connection with participation in the NNMS (hereinafter referred to as ''SuperSOES''). Nasdaq believes that the rule change will bring UTP Exchanges into parity with Nasdaq market makers, as well as reduce the risk of dual liability for both Nasdaq market makers and UTP Exchanges participating in SuperSOES. Nasdaq believes that the rule would also limit the possibility of backing away from quotes by UTP Exchanges and would limit the instances of locked/crossed markets among market participants that participate in a Nasdaq execution system.

Nasdaq believes establishing SuperSOES as the primary platform for trading Nasdaq-listed securities is a critical step in improving the quality of its market. Nasdaq believes that implementation of SuperSOES has significantly improved the Nasdaq Stock Market. In particular, Nasdaq's initial assessment based on preliminary data shows that SuperSOES orders are processed quickly, enjoy high fill rates, and execute at the current market price. Moreover, according to Nasdaq, SuperSOES has not had a significant negative impact on spreads, depth or volatility. In addition, SuperSOES has been voluntarily adopted by the Chicago Stock Exchange, Inc. (''CHX'') and the Boston Stock Exchange, Inc., which currently represent the vast majority of the trading volume in Nasdaq-listed stocks by UTP Exchanges. CHX has participated in SuperSOES since it was implemented in July 2001.[6] As SuperSOES becomes a more familiar feature in the Nasdaq market place, Nasdaq believes it will benefit Nasdaq market participants and public investors by making the operation of Nasdaq more efficient.

According to Nasdaq, permitting UTP Exchanges to participate in Nasdaq without automatic execution functionality perpetuates the potential for ''dual liability'' that Nasdaq designed SuperSOES to eliminate. Nasdaq represents that the potential for dual liability exists when market participants, such as UTP Exchanges, send SelectNet liability messages to

[13] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b-4.

[3] *See* letter from Mary M. Dunbar, Vice President, Office of General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, SEC, dated December 18, 2001 (''Amendment No. 1''). In Amendment No. 1, the NASD removed language that was subsequently incorporated into a different NASD rule change. *See* Securities Exchange Act Release No. 45057 (November 8, 2001), 66 FR 57496 (November 15, 2001).

[4] *See* letter from Mary M. Dunbar, Vice President, Office of General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, SEC, dated January 16, 2002 (''Amendment No. 2'').

[5] *See* Securities Exchange Act Release No. 45319 (January 18, 2002), 67 FR 3923.

[6] In July 2001, the Commission approved a rule change to permit UTP Exchanges to participate on a voluntary basis in SuperSOES. *See* Securities Exchange Act Release No. 44526 (July 6, 2001), 66 FR 36814 (July 13, 2001).