

c. The costs directly attributable to creating the UTP Trade Data Feed, including:

1. The costs of collecting each Participant's last sale and volume amount into the Processor's quote engine;
2. Cost of determining the appropriate last sale price and volume amount within the Processor's trade engine;
3. Cost of utilizing the Processor's trade engine to distribute the UTP Trade Data Feed for distribution to the market data vendors.

4. Cost of the Processor's communication management subsystem that distributes the UTP Trade Data Feed to the market data vendors' networks for further distribution.

d. The additional costs that are shared across all Data Feeds, including:

1. Telecommunication Operations costs of supporting the Participant lines into the Processor's facilities;
2. Telecommunications Operations costs of supporting the external market data vendor network;
3. Data Products account management and auditing function with the market data vendors;
4. Market Operations costs to support symbol maintenance, and other data integrity issues;
5. Overhead costs, including management support of the Processor, Human Resources, Finance, Legal, and Administrative Services.

e. Processor costs excluded from the calculation of net distributable operating income include trade execution costs for transactions executed using a Nasdaq service and trade report collection costs reported through a Nasdaq service, as such services are market functions for which Participants electing to use such services pay market rate.

f. For the purposes of this provision, so long as Nasdaq is the Processor, the following definitions shall apply:

1. "Quote engine" shall mean the Nasdaq's UNISYS or Tandem system that is operated by Nasdaq to collect quotation information for Eligible Securities;
2. "Trade engine" shall mean the Nasdaq Tandem system that is operated by Nasdaq for the purpose of collecting last sale information in Eligible Securities.

4. At the time a Participant implements a Processor-approved electronic interface with the Processor, the Participant will become eligible to receive revenue for the year in which the interface is implemented (implementation year).

5. From the date a Participant is eligible to receive revenue

(implementation date) until December 31 of the implementation year, Nasdaq shall pay the Participant a pro rata amount of its payment or bill the Participant for a pro rata amount of its losses for the implementation year (as calculated in Paragraph 1 above). This calculation and resultant payment (or bill) will be made (or due) within ninety (90) days after the twelfth month following the implementation date.

6. For the calendar year subsequent to the implementation year, and continuing thereafter, the calculation of the Participant's annual payment or loss will be performed and the payment made or bill delivered by March 31 of the following year. Estimated quarterly payments or billings shall be made to each eligible Participant within 45 days following the end of each calendar quarter in which the Participant is eligible to receive revenue, provided that the total of such estimated payments or billings shall be reconciled at the end of each calendar year and, if necessary, adjusted by March 31st of the following year. Interest shall be included in quarterly payments and in adjusted payments made on March 31st of the following year. Such interest shall accrue monthly during the period in which revenue was earned and not yet paid and will be based on the 90-day Treasury bill rate in effect at the end of the quarter in which the payment is made. Interest shall not accrue during the period of up to 45 days between the end of each calendar quarter and the date on which an estimated quarterly payment or billing is made.

In conjunction with calculating estimated quarterly and reconciled annual payments under this Exhibit 1, the Processor shall submit to the Participants an itemized statement setting forth the basis upon which net operating income was calculated, including an itemized statement of the Processor costs set forth in Paragraph 3 of this Exhibit. Such Processor costs shall be reconciled annually based solely on the Processor's audited annual financial information. By majority vote of the Operating Committee, the Processor shall engage an independent auditor to audit the Processor's costs or other calculation(s), the cost of which audit shall be shared equally by all Participants. The Processor agrees to cooperate fully in providing the information necessary to complete such audit.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46131; File No. SR-Amex-2002-38]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC Proposing To Designate the New Trading Floor on the Ground Floor of the Exchange as a "Separate Trading Area"

June 27, 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 April 23, 2002, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On June 6, 2002, the Amex submitted Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice, as amended, 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 Exchange proposes to designate the new trading floor on the ground floor of the Exchange ("Harry's") as a "separate trading area."

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 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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Jeffrey P. Burns, Assistant General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated June 5, 2002 ("Amendment No. 1"). In Amendment No. 1, the Amex confirmed that it currently permits the trading of options on both listed and non-Amex-listed stocks on the "Harry's" trading floor.

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

1. Purpose

The Exchange filed this proposed rule change in connection with its proposal to trade Nasdaq securities on an unlisted basis ("Nasdaq UTP Program").⁴ This proposed rule change would designate Harry's as a "separate trading area."

In 1988, the Exchange received Commission approval to trade options on Amex-listed stocks.⁵ The approval was based upon, among other things, the Amex's trading floors for equities and options on those equities⁶ being sufficiently separated such that there could be no time and place advantage derived from the physical proximity of the two floors which could be exploited. The Amex currently has five designated trading locations: (1) The main trading floor ("Main Trading Floor" or "Designated Stock Area"); (2) the mezzanine trading level, which is located above the Main Trading Floor ("Mezzanine") (options Amex-listed stocks may not trade on that part of the Mezzanine visible from the Main Trading Floor); (3) a separate room connected by a hallway to the Main Trading Floor (the "Red Room" or "Designated Options Area");⁷ (4) the back row of the west side of the Main Trading Floor referred to as the west side of the Exchange Posts 12, 13 and 15 ("Back Row"), and (5) "Harry's". In addition, the Main Trading Floor, the Red Room, the Mezzanine and the Back Row are considered physically separate

for purposes of stocks and related options.⁸

In 2001, the Exchange opened its new trading facility, Harry's, located in a separate area on the ground floor of the Exchange. Harry's is on a separate level of the Amex and may only be accessed from the Exchange's other trading locations by an escalator. Accordingly, Harry's is physically separate from the other trading areas at the Exchange, and therefore, is not visible from the Exchange's other trading locations. The Exchange submits that Harry's is a "separate trading area."⁹

In the 1998 Order, the Commission granted approval to permit options trading on Amex-listed stocks in two locations of the Exchange in addition to the Red Room: (1) The Mezzanine and (2) the Back Row.¹⁰ Since the 1998 approval was granted, the trading of options on Amex-listed securities has continued to occur on the Exchange at locations that are deemed physically separate from locations where the trading of Amex-listed securities occurs. The Exchange maintains that Harry's is a physically separate trading location, and therefore, trading of options on Amex-listed stocks is permissible based on the 1988 and 1998 Orders. In addition, the absence of a "line of sight" with respect to options trading on Harry's and any underlying stock of such option reinforces the Exchange's belief that Harry's is a separate trading area and, therefore, no time or place advantage exists.¹¹ The Exchange believes that it is consistent with both the 1988 and 1998 Orders, as well as the Index Order, to permit the trading of options on both Amex-listed and non-Amex-listed stocks on Harry's.¹² The

Exchange believes that the Commission should approve the designation of Harry's as a "separate trading area."

2. Statutory Basis

The Exchange believes the basis for the proposed rule change is the requirement under section 6(b)(5) of the Act¹³ that an exchange have rules that are 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 facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, to protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers, or 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.

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

Assistant General Counsel, Amex, and, Kelly Riley, Senior Special Counsel, Division, Commission, on June 6, 2002. See also Amendment No. 1, *supra* note 3.

¹³ 15 U.S.C. 78f(b)(5).

⁴ See Securities Exchange Act Release Nos. 45365 (January 30, 2002), 67 FR 5626 (February 6, 2002) (proposing to admit trading on the Amex of Nasdaq National Market Securities pursuant to unlisted trading privileges); 45698 (April 5, 2002), 67 FR 18051 (April 12, 2002) (approving proposal to adopt Amex Rule 28 to establish allocation procedures for securities admitted to dealings on an unlisted trading privilege basis).

⁵ Securities Exchange Act Release No. 26147 (October 3, 1988), 53 FR 39556 (October 7, 1988) ("1988 Order").

⁶ For purposes of this proposal, the terms stock(s), equity and equities are used interchangeably.

⁷ Amex-listed stocks, options on non-Amex-listed stocks and options on indices (excluding options on indices where Amex-listed stocks comprise more than ten percent of the index value by weight) trade on the Main Trading Floor. Options on indices where Amex-listed stocks comprise more than ten percent of the index value by weight and options on non-Amex-listed stocks trade on the Mezzanine. Options on Amex-listed stocks, non-Amex-listed stocks and indices where Amex-listed stocks comprise more than ten percent of the index value by weight trade in the Red Room. See Securities Exchange Act Release No. 34359 (July 12, 1994), 59 FR 36799 (July 19, 1994) ("Index Order").

⁸ See 1988 Order, *supra* note 4; Securities Exchange Act Release No. 39631 (February 9, 1998), 63 FR 8229 (February 18, 1998) ("1998 Order").

⁹ The Exchange currently permits the trading of options on both listed and non-Amex-listed stocks on Harry's.

¹⁰ See 1998 Order, *supra* note 7.

¹¹ The Exchange represents that it maintains adequate surveillance systems designed to prevent trading abuses and manipulation as well as to ensure compliance with the relevant Exchange rules consistent with the 1988, 1998 and Index Orders. Telephone Conversation between Jeffrey P. Burns, Assistant General Counsel, Amex, and Christopher Solgan, Law Clerk, Division, Commission, on May 17, 2002.

¹² The Exchange notes that it has filed a companion proposal to expand designated trading locations to permit the ability to trade an Amex-listed stock and its underlying options on Harry's provided that an intervening post or physical structure sufficient to block a "line of sight" between the appropriate trading crowds existed. See File No. SR-Amex-2002-37. Accordingly, if approved, the Exchange may determine to trade Amex-listed stocks on Harry's provided a "line of sight" does not exist between the trading crowds of the underlying stock and its related option. Telephone Conversation between Jeffrey P. Burns,

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 filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-Amex-2002-38 and should be submitted by July 26, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46146; File No. SR-Amex-2002-51]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC Amending Exchange Rules 576 and 585, and Sections 722 and 725 of the Amex Company Guide

June 28, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4² thereunder, notice is hereby given that on June 3, 2002, 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 Exchange proposes to amend Exchange Rules 576 and 585, and Sections 722 and 725 of the *Amex*

Company Guide. The proposed changes would implement the same fee structure governing the reimbursement of member organizations for costs incurred in the transmission of proxy and other shareholder communications that was recently adopted by the New York Stock Exchange, Inc. ("NYSE").

Below is the text of the proposed rule change. Proposed new language is italicized; proposed deleted language is [bracketed].

* * * * *

Transmission of Proxy Material to Customers

Rule 576. (a). No change.

(b) Such member organization shall transmit with such material either:

(1) A request for voting instructions and, as to matters which may be voted without instructions under Rule 577, a statement to the effect that, if such instructions are not received by the tenth day before the meeting, the proxy may be given at discretion by the owner of record of the stock; provided, however, that such statement may be made only when the proxy soliciting material is transmitted to the beneficial owner of the stock or to the beneficial owner's designated investment adviser, at least fifteen days before the meeting. When the proxy soliciting material is transmitted to the beneficial owner of the stock or to the beneficial owner's designated investment adviser twenty-five days or more before the meeting, the statement accompanying such material shall be to the effect that the proxy may be given fifteen days before the meeting at the discretion of the owner of record of the stock; or

(2) A signed proxy indicating the number of shares held for such beneficial owner and bearing a symbol identifying the proxy with proxy records of such member organization, and also a letter informing the beneficial owner or the beneficial owner's designated investment adviser, of the necessity for completing the proxy form and forwarding it to the person soliciting proxies in order that the shares may be represented at the meeting.

This rule shall not apply to beneficial owners outside the United States.

* * * Commentary

.10 through .70 No change.

.80 Schedule of approved charges by member organization in connection with proxy solicitations.—The Exchange has approved the following as fair and reasonable rates of reimbursement of member organizations for all out-of-pocket expenses, including reasonable clerical expenses, incurred in

connection with proxy solicitations pursuant to Rule 576 and in mailing interim reports or other material pursuant to Rule 585. *In addition to the charges specified in this schedule, member organizations also are entitled to receive reimbursement for: (i) actual postage costs (including return postage at the lowest available rate); (ii) the actual cost of envelopes (provided they are not furnished by the person soliciting proxies); and (iii) any actual communication expenses (excluding overhead) incurred in receiving voting returns either telephonically or electronically.[:]*

Charges for Initial Proxy and/or Annual Report Mailings

[60¢] 40¢ for each set of proxy material, i.e. proxy statement, form of proxy and annual report when mailed as a unit, *unless an opposition proxy statement has been furnished to security holders* [for those meetings that do not include a proposal which requires beneficial owner instructions, plus postage], with a minimum of \$5.00 for all sets mailed;

[70¢] \$1.00 for each set of proxy material, i.e., proxy statement, form of proxy and annual report when mailed as a unit, *for a meeting for which an opposition proxy statement has been furnished to security holders* [for those meetings which include a proposal requiring beneficial owner instructions, plus postage], with a minimum of \$5.00 for all sets mailed;

[20¢] 15¢ for each copy, plus postage, for annual reports, which are mailed separately from the proxy material pursuant to the instruction of the person soliciting proxies, with a minimum charge of \$3.00 for all sets mailed.

The Exchange has approved, as fair and reasonable, the following supplemental proxy fees for intermediaries that coordinate multiple nominees: \$20.00 per nominee plus (i) 10¢ for each set of proxy material, with respect to issuers whose shares are held in fewer than 200,000 nominee accounts, or (ii) 5¢ for each set of proxy material, with respect to issuers whose shares are held in at least 200,000 nominee accounts.

Charges for Proxy Follow-up Mailings

40¢ for each set of follow-up materials, plus postage. [, when the follow-up material is mailed to all beneficial owners;]

[60¢ for each set of follow-up materials, plus postage, when the follow-up material is mailed only to beneficial owners who have not responded to the initial mailing;]

¹⁴ 17 CFR 200.30-3(a)(12).

¹⁵ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.