

it is further ordered that the automatic stay of delegated action pursuant to Rule 431(e) of the Rules of Practice<sup>4</sup> is hereby lifted.

In considering whether to accept or reject the Knight Petition, Rule 411(b)(2) of the Rules of Practice<sup>5</sup> requires that the Commission determine whether:

(i) A prejudicial error was committed by the Division in the conduct of the proceeding; or

(ii) The Division's decision embodies:  
(A) a finding or conclusion of material fact that is clearly erroneous; or

(B) a conclusion of law that is erroneous; or

(C) an exercise of discretion or decision of law or policy that is important and that the Commission should review.

The Knight Petition does not allege that any prejudicial error was committed by the Division in the conduct of the proceedings, and the Commission finds that no such prejudicial error occurred. Moreover, the Commission finds that the Division's decision does not embody a finding of material fact that is clearly erroneous or a conclusion of law that is erroneous.

In so finding, the Commission notes that it previously has approved of securities being traded pursuant to unlisted trading privileges ("UTP") and such approval applies generally to floor based exchanges without automatic execution of orders that engage in UTP trading.<sup>6</sup> As the Knight Petition makes clear, Knight's principal dispute is not with the Division's approval by

delegated authority of the American Stock Exchange LLC's ("Amex") proposed trading rules setting auction market structure. Rather, Knight seeks review of the Commission granting permission to auction markets without automatic execution of orders to trade securities pursuant to UTP generally.<sup>7</sup>

In other words, Knight does not challenge the Amex's proposed rules that are the subject of the Division's approval order, but rather objects to the manner in which Amex's market will interact with other markets also trading Nasdaq securities pursuant to UTP. Such concerns are not properly cognizable in the context of the rule filing process for the Amex's trading rules. Rather, the proper venue for Knight's arguments was the notice and approval process for the 12th Amendment to OTC/UTP Plan,<sup>8</sup> in which amendment the extension of UTP to the Amex was approved under section 12(f) of the Securities Exchange Act of 1934.<sup>9</sup> The time for such arguments has lapsed.

To the extent that Knight does object to the Amex trading rules that were the subject of the Division's order, their objection is that Amex does not provide for automatic executions. As the Division correctly points out in its order, the standards applicable to the Amex proposal do not require that Amex provide automatic execution. We specifically so find and conclude ourselves. The Division considered all comments on the proposed Amex rules including Knight's, addressed them, and correctly applied the applicable standard.

Finally, because these rules—unlike the grant of UTP—do not raise any important issues, the Commission also finds that the Division's decision does not embody an exercise of discretion or a decision of law or policy that is important and that the Commission should review.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>4</sup> 17 CFR 201.431(e).

<sup>5</sup> 17 CFR 201.411(b)(2).

<sup>6</sup> See Securities Exchange Act Release Nos. 34371 (July 13, 1994), 59 FR 37103 (July 20, 1994); 35221 (January 11, 1995), 60 FR 3886 (January 19, 1995); 36102 (August 14, 1995), 60 FR 43626 (August 22, 1995); 36226 (September 13, 1995), 60 FR 49029 (September 21, 1995); 36368 (October 13, 1995), 60 FR 54091 (October 19, 1995); 36481 (November 13, 1995), 60 FR 58119 (November 24, 1995); 36589 (December 13, 1995), 60 FR 65696 (December 20, 1995); 36650 (December 28, 1995), 61 FR 358 (January 4, 1996); 36934 (March 6, 1996), 61 FR 10408 (March 13, 1996); 36985 (March 18, 1996), 61 FR 12122 (March 25, 1996); 37689 (September 16, 1996), 61 FR 50058 (September 24, 1996); 37772 (October 1, 1996), 61 FR 52980 (October 9, 1996); 38457 (March 31, 1997), 62 FR 16880 (April 8, 1997); 38794 (June 30, 1997) 62 FR 36586 (July 8, 1997); 39505 (December 31, 1997) 63 FR 1515 (January 9, 1998); 40151 (July 1, 1998) 63 FR 36979 (July 8, 1998); 40896 (December 31, 1998), 64 FR 1834 (January 12, 1999); 41392 (May 12, 1999), 64 FR 27839 (May 21, 1999); 42268 (December 23, 1999), 65 FR 1202 (January 6, 2000); 43005 (June 30, 2000), 65 FR 42411 (July 10, 2000); 44099 (March 23, 2001), 66 FR 17457 (March 30, 2001); 44348 (May 24, 2001), 66 FR 29610 (May 31, 2001); 44552 (July 13, 2001), 66 FR 37712 (July 19, 2001); 44694 (August 14, 2001), 66 FR 43598 (August 20, 2001); 44804 (September 17, 2001), 66 FR 48299 (September 19, 2001); 45081 (November 19, 2001), 66 FR 59273 (November 27, 2001).

<sup>7</sup> Markets engaged in the trading of securities pursuant to UTP are parties to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis ("OTC/UTP Plan").

<sup>8</sup> See Securities Exchange Act Release Nos. 44822 (September 20, 2001), 66 FR 50226 (October 2, 2001) (12th Amendment Notice); 45081 (November 19, 2001); 66 FR 59273 (November 27, 2001) (12th Amendment Approval).

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

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** [67 FR 54506, August 22, 2002].

**STATUS:** Open meeting.

**PLACE:** 450 Fifth Street, NW., Washington, DC.

**DATE AND TIME OF PREVIOUSLY ANNOUNCED MEETING:** Tuesday, August 27, 2002 at 10 a.m.

**CHANGE IN THE MEETING:** Deletion of Item.

The following item will not be considered at the open meeting scheduled for Tuesday, August 27, 2002:

The Commission will consider whether to issue a notice of an application from The Mexico Fund, Inc. (the "Fund") seeking certain exemptions from the Investment Company Act of 1940.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 942-7070.

Dated: August 27, 2002.

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34-46400; File No. SR-Amex-2002-66]**

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC Relating to a Waiver of Transaction Fees for Exchange-Traded Funds

August 22, 2002.

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 6, 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 Amex has designated this proposal as one establishing or changing a due, fee, or

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

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

other charge imposed by the Exchange pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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 Amex proposes to waive transaction fees on Exchange-Traded Funds ("ETFs") that are part of an exchange-for-physical transaction ("EFP"). The text of the proposed rule change is available at the Amex 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, the Exchange included statements concerning the purpose of and basis for its proposal and discussed any comments it received regarding the proposal. 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

The Exchange currently imposes a charge for transactions in ETF products executed on the Exchange. Currently, charges include fees for Registered Options Traders ("ROTs"), Specialists and Customer Broker-Dealers. The current rate for Specialist transactions in these products is \$0.0063 per share (\$0.63 per 100 shares), capped at \$300 per trade (47,619 shares). The current rate for ROT transactions is \$0.0073 per share (\$.73 per 100 shares), capped at \$350 per trade (47,945 shares). Off-floor orders (*i.e.*, customer and broker-dealer) are charged \$0.006 per share (\$0.60 per 100 shares), capped at \$100 per trade (16,667 shares).<sup>5</sup>

The Amex now proposes that transaction fees paid in connection with ETFs be waived for EFP transactions. An EFP is a transaction in which one party buys the cash market and sells the futures market while the opposite party sells the cash market and buys the futures market. The terms of such transactions are privately negotiated. An EFP may be executed on or off the trading floor in the futures market while the cash side of the trade may be executed in the over-the-counter market or on the Exchange. Consistent with the Commodity Exchange Act ("CEA") and the rules of the Chicago Mercantile Exchange ("CME"), ETFs are currently permitted by the CME to be used as the cash market side of certain stock index futures products. In such case, the cash market product is required to be comparable with respect to the quantity, value or risk exposure to the futures contract utilized.

The Exchange believes that ETF trades in connection with EFPs are taking place off-floor largely due to the imposition of transaction fees. As a result, the Amex has proposed this waiver of ETF transaction fees for those ETFs that are part of an EFP.<sup>6</sup>

However, because the Exchange's billing system is unable to distinguish an ETF transaction that is part of an EFP from any other ETF transaction, a manual procedure has been developed. Specifically, within thirty (30) calendar days of the particular transaction date, a Fee Reimbursement Form must be completed and submitted to the Exchange. Upon acceptance, the Exchange will deliver to that member's clearing firm a reimbursement check in the amount of the transaction fee charged on ETF transactions executed pursuant to an EFP trade as described above.

##### 2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act<sup>7</sup> in general, and furthers the objectives of Section 6(b)(4)<sup>8</sup> in particular in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among the Amex's members and issuers

and other persons using the Amex's facilities.

#### 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

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>9</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder,<sup>10</sup> because it establishes or changes a due, fee, or other charge imposed by the Amex. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal 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 number SR-Amex-2002-66 and should be submitted by September 19, 2002.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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

<sup>5</sup> The Exchange in response to the New York Stock Exchange, Inc. ("NYSE") trading of ETFs has waived customer transaction charges for certain ETFs and Holding Company Depository Receipts (HOLDERS). Specifically, customer transaction charges have been waived for DIAMONDS, QQQs, SPDRS, iShares S&P 500, MidCAP SPDRS, all Select SPDRS and all HOLDERS. See Exhibit A.

<sup>6</sup> The fees that are being waived are member fees only, and the waiver is applied in a non-discriminatory fashion. The Amex will file a proposed rule change if the Amex decides to either establish new fees or reinstate the fees it waived with this proposed rule change. August 22, 2002 telephone conversation between Jeffrey P. Burns, Assistant General Counsel, Amex, and Joseph Morra, Special Counsel, SEC.

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

<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>10</sup> 17 CFR 240.19b-4(f)(2).

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 02-22097 Filed 8-28-02; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46397; File No. SR-CBOE-2002-44]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Incorporated To Amend its Rules To Eliminate the "Book Indicator"

August 21, 2002.

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 19, 2002, the Chicago Board Options Exchange, Incorporated ("CBOE" 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 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

The Exchange proposes to amend its rules to eliminate the "Book Indicator."

#### 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 IV below. The 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 Change

##### 1. Purpose

The Exchange is proposing to eliminate the "Book Indicator." This indicator is affixed to the CBOE disseminated quotation when an order in the Exchange's book represents the best bid or offer on the Exchange. It alerts brokers and the public that the bid, offer or both are being generated by orders in the book, not by market-maker quotes. The Book Indicator was adopted as part of the Exchange's initiative to provide split-price Retail Automatic Execution System ("RAES") executions for incoming customer orders when the prevailing best bid (offer) is generated by an existing customer order in the CBOE book.<sup>3</sup> At the time split-price execution functionality was adopted, CBOE's disseminated quote did not display size. Thus, the Book Indicator served to alert customers that an RAES eligible order might not be executed in its entirety at CBOE's displayed price. For example, if the RAES limit was 50 contracts, and the best bid was a customer order in the book for 3 contracts, an incoming RAES order to sell 40 contracts would only be entitled to the book price for 3 contracts. However, because a customer would not know that the CBOE best bid was a booked order, the customer might expect his 40 contract order to execute in its entirety at the bid disseminated by CBOE. The Book Indicator alerted the customer that he might receive a split-price execution.

Now that CBOE disseminates quotes with size, it no longer needs the Book Indicator. Today, in the above example, CBOE's disseminated bid would contain a size of 3 contracts. Thus, the customer would know that an RAES sell order would receive only 3 contracts at the disseminated bid price. This obviates the need for the Book Indicator; therefore CBOE proposes to eliminate it.

##### 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act<sup>4</sup> in general and furthers the objectives of Section 6(b)(5)<sup>5</sup> in particular in that it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system,

and protect investors and the public interest.

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

This proposed rule change does not impose any burden on competition that is 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 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 CBOE. All submissions should refer to the File No. SR-CBOE-2002-44 and should be submitted by September 19, 2002.

<sup>11</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. 43932 (February 6, 2001), 66 FR 10332 (February 14, 2001).

<sup>4</sup> 15 U.S.C. 78f(b).

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