

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Jonathan G. Katz,**

*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47113; File No. SR-Amex-2002-89]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 by American Stock Exchange LLC Relating to Crossing Procedures for Clean Agency Crosses

December 31, 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 November 5, 2002, 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. On December 23, 2002, the Exchange 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

The Exchange proposes to amend Amex Rule 126(g), Commentary .02 to provide that orders of 5,000 shares or more for the account of a non-member organization may be crossed at a price at or within the bid or offer without being broken up by a specialist or Registered Trader at the cross price. The text of the proposed rule is below. Proposed new language is in *italics*; proposed deletions are in brackets.

\* \* \* \* \*

Rule 126(g)

Commentary

.02 When a member has an order to buy and an order to sell an equivalent

amount of the same security, and both orders are of 5,000 shares or more and are for the accounts of persons who are not members or member organizations, the member may "cross" those orders at a price at or within the prevailing quotation. The member's bid or offer shall be entitled to priority at such cross price, irrespective of pre-existing bids or offers at that price. The member shall follow the crossing procedures of Rule 151, and another member may trade with either the bid or offer side of the cross transaction only to provide a price which is better than the cross price as to all or part of such bid or offer. A member who is providing a better price to one side of the cross transaction must trade with all other market interest having priority at that price before trading with any part of the cross transaction. No member may break up the proposed cross transaction, in whole or in part, at the cross price. *No specialist or Registered Trader may effect a proprietary transaction to provide price improvement to one side or the other of a cross transaction effected pursuant to this Commentary .02.* A transaction effected at the cross price in reliance on this Commentary .02 shall be printed as "stopped stock".

\* \* \* \* \*

#### 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.

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

###### 1. Purpose

Amex Rule 126 (Precedence of Bids and Offers) sets out rules governing priority and precedence of bids and offers on the Exchange Floor, and generally provides that bids and offers are entitled to precedence based on time, with a member bidding at the highest price (offering at the lowest price) entitled to priority, and members simultaneously bidding at the highest price (offering at the lowest price) entitled to be on parity and divide

executions at their price after a previous sale removes all bids and offers from the Floor. Commentary .02 to Amex Rule 126(g) applies only to agency (that is, both orders for accounts of non-members) crosses (referred to herein as "clean crosses") to buy and sell orders of 5,000 shares or more. This commentary provides that a member may cross those orders at a price at or within the prevailing quotation, with such orders entitled to priority at the cross price over previously entered bids and offers. When crossing these orders, the member must follow the crossing procedures of Amex Rule 151 and another member may trade with either the bid or offer side of the cross, but only to provide price improvement to all or part of the bid or offer. In addition, the member must trade with all other market interest having time priority at that price before trading with any part of the cross transaction.

The Exchange implemented Commentary .02 to facilitate execution of block size crosses on the Amex. In implementing this exception to the Exchange's rules of precedence, and, in reducing minimum share size required to permit a clean cross from 25,000 to 5,000 shares, the Exchange was responding competitively to regional exchanges that were attracting Amex orders because orders to cross are not readily broken up by other trading interest in those markets, which may lack a trading crowd or limit orders on specialists' books.<sup>4</sup>

A member currently is not permitted to break up a proposed clean agency cross at the cross price, but may trade with the bid or offer side to provide price improvement to all or part of the bid or offer. The Exchange proposes to amend Amex Rule 126(g), Commentary .02 to provide that orders of 5,000 shares or more for the account of a non-member or member organization may be crossed at a price at or within the bid or offer without being broken up by a specialist or Registered Trader acting as principal. The proposed rule would still enable members representing agency orders to break up the cross to provide price improvement to all or part of the bid or offer. The purpose of the rule is to continue to reduce the amount of crossing activity lost to regional exchanges or the third market. Because clean crosses are required under Amex Rule 151 to be effected at the minimum price variation, since the advent of decimal pricing, it is possible for the

<sup>4</sup> See File No. SR-Amex-92-41, approved in Release No. 34-34089, May 26, 1994 and File No. SR-Amex-01-02, approved in Release No. 34-44123, March 28, 2001.

<sup>5</sup> 17 CFR 200.30-3(a)(1).

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

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

<sup>3</sup> See letter from Michael Cavalier, Associate General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation, SEC, dated December 20, 2002, and enclosures ("Amendment No. 1"). Amendment No. 1 corrected a typographical error in the text of the proposed amendment.

specialist or other members to interfere with a cross while providing price improvement of only \$.01 to a portion of the cross. This may result in a perception that specialists or Registered Traders will break up a proposed clean cross transaction by trading for their own accounts at a minimally improved price ahead of a public customer on the other side of the cross. This perception could encourage a loss of crossing activity to other markets.

Amex clean cross procedures will continue to preserve auction market principles by providing the possibility of price improvement (because members must follow Amex Rule 151 crossing procedures), and by requiring that members trade with other market interest having time priority at that price before trading with any part of the cross transaction. In addition, the Exchange believes the proposal will enhance competition among markets in the execution of agency crosses.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b)<sup>5</sup> of the Act in general and furthers the objectives of Section 6(b)(5)<sup>6</sup> in particular in that it is 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 is 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 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-2002-89 and should be submitted by January 28, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47106; File No. SR-NASD-2002-99]

### **Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change and Amendment No. 1 by the National Association of Securities Dealers, Inc., and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 Relating to Gross Income Assessments and Personnel Assessments**

December 30, 2002.

## I. Introduction

On July 24, 2002, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities and Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to modify its Member Regulation (including Enforcement) pricing structures to: (1) Implement a three-tiered flat rate for the Gross Income Assessment ("GIA") that would be applied to gross FOCUS revenue and would eliminate existing deductions and exclusions; (2) use the Personnel Assessment as a more prominent assessable base to fund Member Regulation activities. On August 21, 2002, the NASD amended the proposal.<sup>3</sup> The proposed rule change, as modified by Amendment No. 1, was published for notice and comment in the **Federal Register** on August 30, 2002.<sup>4</sup>

The Commission received 13 comment letters on the proposed rule change.<sup>5</sup> On November 29, 2002, the

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

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

<sup>3</sup> See August 21, 2002 letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division") Commission, and attachments ("Amendment No. 1"). In Amendment No. 1, the NASD provided new proposed rule language that completely replaces and supersedes the original proposed rule language, and made minor technical amendments to the rest of the filing.

<sup>4</sup> See Securities Exchange Act Release No. 46417 (August 23, 2002), 67 FR 55893.

<sup>5</sup> August 19, 2002 letter from Mary Yeager, Assistant Secretary, New York Stock Exchange, Inc. ("NYSE") to Jonathan G. Katz, Secretary, Commission ("NYSE Letter"); September 17, 2002 letter from Lanny A. Schwartz, Philadelphia Stock Exchange, Inc. ("Phlx") to Jonathan G. Katz, Secretary, Commission ("Phlx Letter"); September 18, 2002 letter from Edward J. Joyce, President and Chief Operating Officer, Chicago Board Options Exchange ("CBOE") to Jonathan G. Katz, Secretary, Commission ("CBOE Letter"); September 19, 2002 letter from Thomas W. Sexton, Vice President and General Counsel, National Futures Association

Continued

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

<sup>6</sup> 15 U.S.C. 78(f)(b)(5).

<sup>7</sup> 17 CFR 200.30-3(a)(12).