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Chuck Mierzwa.

Clearance Officer.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47643; File No. SR-Amex-2000-49]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval to Proposed Rule Change by the American Stock Exchange LLC to Permanently Approve Its Pilot Program Relating to Facilitation Cross Transactions

April 7, 2003

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 August 22, 2000, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change to revise and permanently approve its pilot program relating to facilitation cross transactions. On August 29, 2000, October 15, 2002, and January 29, 2003, respectively, the Amex filed Amendment Nos. 1, 2, and 3 to the proposed rule change.³ On March 18, 2003, the Amex filed Amendment No. 4 to the proposed rule change, in which the Exchange replaced the original proposal and previous amendments with a proposal to permanently adopt the pilot program in

its present form, and added a clarification concerning specialist participation in facilitation transactions.⁴ The proposed rule change, as amended by Amendment No. 4, is described in Items I and II below, which Items have been prepared by the Exchange. On April 1, 2003, the Amex filed Amendment No. 5 to the proposed rule change, requesting that the Commission accelerate approval of the proposal.⁵ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is granting accelerated approval of the proposed rule change.

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

The Amex proposes to permanently approve its pilot program relating to facilitation cross transactions, with an added clarification concerning specialist participation in such transactions. The text of the proposed rule change is set forth below. Additions are italicized; deletions are in brackets.

* * * * *

Rule 950—Rules of General Applicability

(a)–(c) No change.

(d) The provisions of Rule 126, with the exception of subparagraphs (a) and (b) thereof, shall apply to Exchange options transactions and the following additional commentary shall also apply.

* * * Commentary

.01 No change.

.02 A member who holds both an order for a public customer of a member organization and a facilitation order may cross such orders if:

(a)–(c) No change.

(d)(1) notwithstanding paragraph (c) above, a member firm seeking to facilitate its own public customer's equity option order for the eligible order size will be permitted to participate in the firm's proprietary account as the contra-side of that order to the extent of the percentages set forth below:

(i) 20% of the order if the order is traded at the best bid or offer given by the trading

crowd in response to a floor broker's request for a market; or

(ii) 40% of the order if the member firm improves the market that was provided by the trading crowd in response to a floor broker's request and the order is traded at that best bid or offer.

If, however, a public customer order on the specialist's book or represented in the trading crowd has priority over the facilitation order, the member firm may participate in only those contracts remaining after the public customer's order has been filled.

(2) No change.

(3) if a facilitation transaction pursuant to this subparagraph (d) occurs at the specialist's bid or offer, [then] *the specialist shall be allocated the greater of either (i) 20% of the executed contracts if the facilitating member firm, pursuant to subparagraph (d)(1)(i), has participated to the extent of 20% of the executed contracts; or (ii) a share of the executed contracts that have been divided equally among the specialist and other participants to the trade.*

T[t]he specialist's participation allocation [pursuant to trading floor practices,] shall only apply to the number of contracts remaining after all public customer orders and the member firm's facilitation order have been satisfied. However, the total number of contracts guaranteed to be allocated to the member firm and the specialist in the aggregate shall not exceed 40% of the facilitation transaction. If the facilitation transaction occurs at a price at which the specialist is not on parity, the specialist is entitled to no guaranteed participation allocation.

(4) No change.

.03–.07 No change.

* * * * *

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 III 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 proposes to permanently approve its pilot program

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Claire P. McGrath, Vice President and Special Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated August 28, 2000, and letters from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Elizabeth King, Associate Director, Division, Commission, dated October 14, 2002, and January 28, 2003.

⁴ See letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Elizabeth King, Associate Director, Division, Commission, dated March 17, 2003. The proposed rule change, as originally filed, and Amendment Nos. 1, 2, and 3 contained significant proposed revisions to the pilot program that the Exchange in Amendment No. 4 determined to delete.

⁵ See letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Elizabeth King, Associate Director, Division, Commission, dated March 31, 2003.

relating to facilitation cross transactions, with an added clarification concerning specialist participation in such transactions. The pilot program was initially approved by the Commission on June 2, 2000, was most recently extended on January 10, 2003, and is due to expire on April 7, 2003.⁶

Commentary .02(d) to Amex Rule 950(d) established a pilot program to allow facilitation cross transactions in equity options.⁷ The pilot program entitles a floor broker, under certain conditions, to cross a specified percentage of a customer order with an order for the member firm's proprietary account before specialists and/or registered options traders in the crowd can participate in the transaction. The provision generally applies to orders of 400 contracts or more. However, the Exchange is permitted to establish smaller eligible order sizes, on a class-by-class basis, provided that the eligible order size is not for fewer than 50 contracts.

The amount of the guaranteed participation percentage depends upon a comparison of the original market quoted by the trading crowd in response to a request from the floor broker and the price at which the orders are traded. If the order is traded at the best bid or offer provided by the trading crowd in response to the floor broker's initial request for a market, then the floor broker is entitled to cross 20% of the order. If the order is traded at a price that improves the market provided by the trading crowd (*i.e.*, at a price between the best bid and offer) in response to the floor broker's initial request for a market, then the floor broker is entitled to cross 40% of the order. In addition, the facilitating member firm may only participate in the executed contracts after public customer orders on the specialist's book or represented by a floor broker in the crowd have been filled.

In addition to its proposal to adopt the pilot program permanently, the Exchange proposes to revise subparagraph (d)(3) of Commentary .02

to Amex Rule 950(d) to clarify the participation of the specialist in executed contracts allocated after all public customer orders and the member firm's facilitation order have been satisfied.⁸ Subparagraph (d)(3) would provide that the specialist shall be allocated the greater of either: (i) 20% of the executed contracts if the facilitating member firm, pursuant to the subparagraph (d)(1)(i) of Commentary .02, has participated to the extent of 20% of the executed contracts; or (ii) a share of the executed contracts that have been divided equally among the specialist and other participants to the trade.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act⁹ in general, and furthers the objectives of Section 6(b)(5) of the Act¹⁰ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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 believes that the proposed rule change will impose no 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. 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 the filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-Amex-2000-49 and should be submitted by May 5, 2003.

IV. Commission Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹¹ In its approval of the pilot program,¹² the Commission detailed its reasons for finding the program's substantive features consistent with the Act, and, in particular, the requirements of Sections 6(b)(5) and 6(b)(8) of the Act.¹³ The Commission has previously approved rules on other exchanges that establish substantially similar programs on a permanent basis,¹⁴ and the establishment of the pilot as a permanent program on the Amex raises no new regulatory issues for consideration by the Commission.

The Commission notes that, in approving member firms participation rights and other guaranteed participations in the past, it has found that rules entitling a market participant(s) to up to 40% of an order are not inconsistent with the statutory standards of competition and free and open markets.¹⁵ The Commission has raised concerns, on the other hand, about participation guarantees that "lock up" a larger percentage of an order, and thereby reduce the number of

⁶ See Securities Exchange Act Release Nos. 42894 (June 2, 2000), 65 FR 36850 (June 12, 2000); 43229 (August 30, 2000), 65 FR 54572 (September 8, 2000); 44019 (February 28, 2001), 66 FR 13819 (March 7, 2001); 44538 (July 11, 2001), 66 FR 37507 (July 18, 2001); 44924 (October 11, 2001), 66 FR 53456 (October 22, 2001); 45241 (January 7, 2002), 67 FR 1524 (January 11, 2002); 45703 (April 8, 2002), 67 FR 18272 (April 15, 2002); 46176 (July 9, 2002), 67 FR 47007 (July 17, 2002); 46630 (October 9, 2002), 67 FR 64425 (October 18, 2002); and 47153 (January 10, 2003), 68 FR 2378 (January 16, 2003).

⁷ Facilitation cross transactions occur when a floor broker representing the order of a public customer of a member firm crosses that order with a contra side order from the firm's proprietary account.

⁸ In addition to the clarification provided by the proposed rule change, subparagraph (d)(3) would continue to include the general statement that if the facilitation transaction occurred at the specialist's bid or offer, the total number of contracts guaranteed to the member firm and the specialist in the aggregate could not exceed 40% of the facilitation transaction. If the facilitation transaction occurred at a price at which the specialist was not on parity, the specialist would be entitled to no guaranteed participation allocation.

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹² See *supra*, note 6.

¹³ 15 U.S.C. 78f(b)(5) and (b)(8).

¹⁴ See, e.g., Securities Exchange Act Release Nos. 42835 (May 26, 2000), 65 FR 35683 (June 5, 2000), and 42848 (May 26, 2000), 65 FR 36206 (June 7, 2000).

¹⁵ See, e.g., Securities Exchange Act Release Nos. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000); 42894 (June 2, 2000), 65 FR 36850 (June 12, 2000); 42835 (May 26, 2000), 65 FR 35683 (June 5, 2000); 42848 (May 26, 2000), 65 FR 36206 (June 7, 2000).

contracts for which the trading crowd can compete.¹⁶ The Amex facilitation program guarantees an allocation of no more than 40% of an order to a member firm seeking to facilitate an order. Moreover, the Amex rule includes a provision that limits the number of contracts to be allocated to the facilitating firm and the specialist in the aggregate to no more than 40% of the order. The rule for which the Amex seeks permanent approval is consistent with the Commission's position with respect to participation guarantees.

The language that the Amex proposes to add to the rule would clarify that, if the facilitating firm has participated in the 20% of the contracts to which it is entitled when the order is traded at the best bid or offer provided by the trading crowd in response to the floor broker's initial request for a market, the specialist would be allocated either the greater of 20% of the executed contracts or a share of the executed contracts that have been divided equally among the specialist and other participants in the trade. This provision is consistent with the Commission's position regarding participation guarantees and comports with the Commission's understanding of how the Amex rule was to be applied when the Commission approved the rule on a pilot basis.

As noted above, the Exchange has requested that the Commission grant accelerated approval to the proposed rule change. The Exchange states that the pilot program has been in effect for almost three years without incident and that substantially similar rules are in place at the Chicago Board Options Exchange, the Pacific Exchange, and the International Securities Exchange.¹⁷ The Exchange adds that accelerated approval would obviate the need to extend the pilot program beyond its current expiration date of April 7, 2003.

The Commission finds good cause, consistent with Sections 6(b) and 19(b)(2) of the Act, for approving the proposed rule change prior to the thirtieth day after the date of publication of the notice of filing thereof in the **Federal Register**. The proposal raises no new regulatory issue and will make permanent a pilot program that comports with the facilitation cross rules of other exchanges.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-Amex-2000-49), as amended, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁸

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47648; File No. SR-NASD-2003-53]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Modify Nasdaq Test Facility Pricing Under Rule 7050 for NASD Members

April 8, 2003.

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 March 24, 2003, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), 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 Nasdaq. Nasdaq has designated this proposal as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization under section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposed rule change 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

Nasdaq proposes to modify Nasdaq Test Facility pricing under Rule 7050 for NASD members.⁵ Nasdaq will implement the proposed rule change on April 1, 2003. The text of the proposed rule change is below. Proposed new language is in *italics*; proposed deletions are in [brackets].

* * * * *

¹⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ Nasdaq is also submitting a proposed rule change to establish an identical fee for non-members. See SR-NASD-2003-54.

7050. Other Services

(a) No change.

(b) No change.

(c) No change.

(d) Nasdaq Testing Facility [(NTF)]

(1) Subscribers that conduct tests of their computer-to-computer interface (CTCI), NWII application programming interface (API), or market data vendor feeds through the Nasdaq Testing Facility (NTF) [of The Nasdaq Stock Market, Inc. (Nasdaq)] shall pay the following charges:

\$285/hour—For an *Active Connection* for CTCI/NWII API testing [between 9 a.m. and 5 p.m. E.T. on business days] during the normal operating hours of the NTF;

\$75/hour—For an *Idle Connection* for CTCI/NWII API testing during the normal operating hours of the NTF, unless such an *Idle Connection* is over a dedicated circuit;

No charge—For an *Idle Connection* for CTCI/NWII API testing if such an *Idle Connection* is over a dedicated circuit during the normal operating hours of the NTF;

\$333/hour—For CTCI/NWII API testing (for both *Active* and *Idle Connections*) at all [other] times other than the normal operating hours of the NTF [on business days, or on weekends and holidays].

(2)(A) An "*Active Connection*" commences when the user begins to send and/or receive a transaction to and from the NTF and continues until the earlier of disconnection or the commencement of an *Idle Connection*.

(B) An "*Idle Connection*" commences after a *Period of Inactivity* and continues until the earlier of disconnection or the commencement of an *Active Connection*. If a *Period of Inactivity* occurs immediately after subscriber's connection to the NTF is established and is then immediately followed by an *Idle Connection*, then such *Period of Inactivity* shall also be deemed a part of the *Idle Connection*.

(C) A "*Period of Inactivity*" is an uninterrupted period of time of specified length when the connection is open but the NTF is not receiving from or sending to subscriber any transactions. The length of the *Period of Inactivity* shall be such period of time between 5 minutes and 10 minutes in length as Nasdaq may specify from time to time by giving notice to users of the NTF.

(3) The foregoing hourly fees shall not apply to market data vendor feed testing, or testing occasioned by:

(A) new or enhanced services and/or software provided by Nasdaq[,] or

¹⁶ See, e.g., Securities Exchange Act Release No. 43100 (July 31, 2000), 65 FR 48778 (August 9, 2000).

¹⁷ See Amendment No. 5.