

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

After careful consideration, the Commission finds that the proposed rule change as amended is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b)(5) of the Act.<sup>10</sup> The Commission believes that the proposed changes to the voting procedures pilot program would not significantly affect the protection of investors or the public interest, and would not impose any significant burden on competition.

The Amex has requested accelerated approval of its proposal to amend the marketing fee program voting procedures set forth in its six-month pilot program, which is due to expire as of March 30, 2004. According to the Amex, the proposal raises no novel issues and would merely expand ROT voter eligibility in connection with the Exchange's marketing fee program. Based upon the Amex's representations, the Commission finds good cause, consistent with Sections 6(b)(5) and 19(b)(2) of the Act,<sup>11</sup> to approve the proposed rule change as amended as a pilot program prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Commission believes that the proposed change to the marketing fee program voting procedures, as set forth in Commentary .11(a)(i) of Amex Rule 958, would help to provide greater access to and participation in the voting process for ROTs that have significant trading activity in those option classes that are subject to the marketing fee, and that are traded by multiple specialists in adjacent trading locations. The Exchange has tailored the proposal to provide specific criteria for determining eligibility to participate in the marketing fee program vote when multiple option classes are traded by multiple specialists. Accordingly, the Commission is approving, on an

accelerated basis, the proposed change to the marketing fee program voting procedures on a pilot basis to expire on March 30, 2004.<sup>12</sup>

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>13</sup> that the proposed rule change as amended to Commentary .11(a)(i) to Amex Rule 958 (SR-AMEX-2003-114) is hereby approved on an accelerated basis as a pilot program to expire on March 30, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49116; File No. SR-Amex-2003-111]

#### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the American Stock Exchange LLC Relating to Listing and Delisting Appeal Hearing Fees

January 22, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, as amended ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 12, 2003, 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 American Stock Exchange LLC ("Amex" or "Exchange") proposes to amend Sections 1203, 1204 and 1205 of the Exchange's *Company Guide* to increase the fees applicable to issuers requesting review of a determination to

<sup>12</sup>In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78s(b)(2).

<sup>14</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.

limit or prohibit the initial or continued listing of their securities. 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 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 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 the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

Part 12 of the Amex *Company Guide* provides that issuers may request a written or oral review of a determination by the Listing Qualifications Staff to limit or prohibit the initial or continued listing of their securities before a Listing Qualifications Panel ("Panel") comprised of at least two, but generally three, members of the Amex Committee on Securities ("Committee"). The fee for a written review is \$1,500, and the fee for an oral hearing is \$2,500. Issuers may also request a review of a Panel decision by the Committee. The fee for such a review, which is conducted on the written record unless the Committee determines to hold oral hearings, is \$2,500.

The hearing fee structure was adopted in September 2001, and was intended to cover the cost of holding the hearing (*i.e.*, allocated staff and overhead costs as well as fees for court reporters, conference calls and other miscellaneous expenses).<sup>3</sup> Amex management believes that the fees should be increased at this time, because the allocated cost of staff and other resources necessary to prepare for and conduct listing hearings exceeds the current permitted fees, particularly in the case of delisting hearings that are often extremely complicated and contentious. Accordingly, the Amex proposes to increase the fee for Panel hearings to \$4,000 for a written hearing

<sup>3</sup> See Securities Exchange Act Release No. 44768 (September 6, 2001), 66 FR 47709 (September 13, 2001) (SR-Amex-2001-36).

<sup>10</sup> 15 U.S.C. 78f(b)(5). Section 6(b)(5) of the Act requires that the rules of a national securities exchange be "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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers."

<sup>11</sup> 15 U.S.C. 78f(b)(5) and 78s(b)(2).

and \$5,000 for an oral hearing, and \$5,000 for appeals to the Committee.

In addition, the Amex proposes that, in the case of a delisting hearing, a listed company seeking an appeal of a Staff delisting determination be required to satisfy all outstanding listing fees due to the Exchange before any payment will be credited towards a hearing fee. The Amex believes that, in some cases, listed companies with substantial unpaid listing fee balances have been able to engage in frivolous appeals in order to delay an inevitable delisting. While the appeal process provides an important avenue to seek a review of Staff determinations, the Exchange does not believe it is appropriate for a listed company that is delinquent with respect to its listing fees to be able to access this process. In this connection, the Amex notes that a listed company that appears to be delinquent with respect to fees owed is given many opportunities to question the invoices and past due bills sent, if the company believes that the fees assessed are erroneous. Further, failure to pay listing fees in and of itself subjects the company to delisting pursuant to Section 1003(iv) of the Amex *Company Guide*, and a listed company which is delinquent with respect to its listing fees will have received notice to this effect in connection with the Staff delisting determination. Therefore, the Exchange believes that there are sufficient safeguards in place to prevent a listed company from being unfairly barred from appealing a delisting.<sup>4</sup>

The Amex also proposes that Sections 1203 and 1204 of the Amex *Company Guide* be clarified to specify that appeal requests must be submitted to the Amex Office of General Counsel.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, the requirements of Section 6(b) of the Act.<sup>5</sup> Specifically, the Exchange believes the proposed rule change furthers the objectives of Section 6(b)(5)<sup>6</sup> in that the proposal is designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade, to foster cooperation and coordination with

<sup>4</sup> Furthermore, any company that believes it has been improperly denied a hearing would have the right to appeal such denial to the Securities and Exchange Commission as provided in Section 19(d) of the Act and Rule 19d-3 thereunder. See 15 U.S.C. 78s(d); 17 CFR 240.19d-3.

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

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

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. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR-Amex-2003-111. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, your comments should be sent in hardcopy or by e-mail but not by both methods. 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 at the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of Amex. All submissions should refer to the File No. SR-Amex-2003-111 and should be submitted by February 19, 2004.

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. 34-49118; File No. SR-CBOE-2003-60]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No.1 Thereto by the Chicago Board Options Exchange, Incorporated Relating to Calendar Year 2004 Fees

January 22, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on December 31, 2003, the Chicago Board Options Exchange, Incorporated ("CBOE" 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 CBOE. On January 16, 2004, the Exchange submitted Amendment No. 1 to the proposal by facsimile.<sup>3</sup> The proposed rule change, as amended, has been filed by the CBOE as establishing or changing a due, fee, or other charge, pursuant to section

<sup>7</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 letter to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, from Christopher R. Hill, Attorney II, CBOE, dated January 16, 2004 ("Amendment No. 1"). In Amendment No. 1, the Exchange revised the rule text to clarify the time period that the customer large trade discount pilot plan will be in effect.