

dealers, (b) prevent unjust discrimination or preferential treatment among buyers resulting from sales at different prices, and (c) assure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state (a) that secondary market trading in Shares does not involve the Funds as parties and cannot result in dilution of an investment in Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand, not as a result of unjust or discriminatory manipulation. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because arbitrage activity will ensure that the difference between the market price of Shares and their NAV remains narrow.

#### *Section 17(a) of the Act*

7. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such a person, from selling any security to or purchasing any security from the company. Because purchases and redemptions of Creation Units will be "in-kind" rather than cash transactions, section 17(a) may prohibit affiliated persons of the Fund from purchasing or redeeming Creation Units. Because the definition of "affiliated person" or another person in section 2(a)(3)(A) of the Act includes any person owning five percent or more of an issuer's outstanding voting securities, every purchaser of a Creation Unit will be affiliated with a Fund so long as fewer than twenty Creation Units of the Fund are in existence. In addition, any person owning more than 25% of the Shares of a Fund may be deemed an affiliated person under section 2(a)(3)(C) of the Act. Applicants request an exemption from section 17(a) under sections 6(c) and 17(b), to permit such affiliated persons of the Funds to purchase and redeem Creation Units.

8. Section 17(b) authorizes the Commission to exempt a proposed transaction from section 17(a) if

evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Applicants contend that no useful purpose would be served by prohibiting the affiliated persons of a Fund described above from purchasing or redeeming Creation Units. The composition of a Fund Deposit made by a purchaser or the Fund Securities and Cash Redemption Amount given to a redeeming investor will be the same regardless of the investor's identity, and will be valued under the same objective standards applied to valuing the Portfolio Securities. Therefore, applicants state that "in kind" purchases and redemptions will afford no opportunity for the affiliated persons described above to effect a transaction detrimental to the other holders of its Shares. Applicants also believe that "in kind" purchases and redemptions will not result in abusive self-dealing or overreaching by affiliated persons of the Fund.

#### **Applicants' Conditions**

Applicants agree that any order of the SEC granting the requested relief will be subject to the following conditions:

1. Applicants will not register the Shares of any Future Fund by means of filing a post-effective amendment to a Trust's registration statement or by any other means, unless (a) applicants have requested and received with respect to such Future Fund, either exemptive relief from the Commission or a no-action letter from the Division of Investment Management of the Commission, or (b) the Future Fund will be listed on a national securities exchange without the need for a filing pursuant to rule 19b-4 under the Exchange Act.

2. Each Fund's prospectus will clearly disclose that, for purposes of the Act, Shares are issued by the Fund and that acquisition of Shares by investment companies is subject to the restrictions of section 12(d)(1) of the Act.

3. As long as each Trust operates in reliance on the requested order, the Shares of the Funds will be listed on a national securities exchange.

4. Neither the Trusts nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Each Fund's prospectus will prominently disclose that the Shares are not individually redeemable

and that owners of the Shares may acquire those Shares from the Trust and tender those Shares for redemption to the Trust in Creation Units only.

5. The website for each Trust, which will be publicly accessible at no charge, will contain the following information, or a per Share basis, for each Fund: (a) the prior business day's NAV and the reported closing price, and a calculation of the premium or discount of such price against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.

6. The prospectus and annual report for each Fund will also include: (a) the information listed in condition 6(b), (i) in the case of the prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable) and (ii) in the case of the annual report, for the immediately preceding five years, as applicable; and (b) the following data, calculated on a per Share basis for one, five and ten year periods (or life of the Funds): (i) the cumulative total return and the average annual total return based on NAV and market price, and (ii) the cumulative total return of the relevant Index.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**  
*Deputy Secretary.*

[FR Doc. 00-22988 Filed 9-6-00; 8:45 am]

BILLING CODE 8010-01-M

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-43228; File No. SR-AMEX-00-38]

### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1, Amendment No. 2, and Amendment No. 3 Thereto by American Stock Exchange LLC Relating to Fees on Equity Option Transactions of Specialist and Registered Option Traders**

August 30, 2000.

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 July 20, 2000, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Amex. The Amex submitted Amendments No. 1, 2, and 3 to the proposed rule change on August 17, 24, and 28, 2000, respectively. 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 Amex proposes to establish a marketing fee for equity option transactions of specialists and registered options traders. The text of the proposed rule change is available at the principal office of the Amex.

### **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 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 Amex proposes to establish a new equity option marketing fee on the transactions of specialists and registered options traders, designed to compete for order flow in equity options traded on the Exchange. The revenue that these marketing fees generate will be used to compete for order flow in equity options listed for trading on the Exchange. Through the program, the Exchange will collect a fee of \$0.40 on every equity option contract that specialists and registered options traders execute on the Exchange. The Exchange will collect fees on all equity option transactions except for those options overlying Nasdaq-100 index shares. In addition, trades between registered options traders and trades between specialists

and registered options traders will not be subject to the program.

The Exchange will collect the fees and then allocate the funds to all of the Exchange's specialists. The Exchange will allocate the funds among the specialists on a *pro rata* basis, in amounts proportional to each specialist's share of the overall volume of the options traded on the Exchange. Each specialist will use the funds to attract orders in the classes of options that the specialist trades. These funds may be used by Exchange specialists to pay broker-dealers for orders they direct to, and that are executed on, the Exchange. The specific terms governing the orders that qualify for payment and the amount of any payment to be made will be determined by the specialists in whatever manner they believe is most likely to be effective in attracting order flow to the Exchange in options traded by the specialists. The specialists will be obligated to account to the Exchange for the use they make of the funds that the Exchange makes available to them for this purpose, but all determinations concerning the amount the specialists may pay for orders and the types and sizes of orders that qualify for payment will be made exclusively by the specialists, and not by the Exchange.

The Amex will assess the new fee monthly, beginning as of July 1, 2000. The funds that the new fee generates will be segregated according to the station where the classes of options subject to the fee are traded, and will be made available to the specialist at the station where the funds were collected for the specialist's use in attracting orders in the classes of options traded at that station. Members who pay the new fees will also be able to participate in the order flow derived from the program. Accordingly, the Exchange believes that there will be a fair correlation between the costs that the members will pay for the marketing program and the benefits that they will receive from it.

The Exchange may provide administrative support to the specialists in such matters as keeping track of the number of qualified orders each firm directs to the Exchange, and making debits and credits to the accounts of the specialists and the firms to reflect the payments that are to be made. If the amount of the payment to be received by the order flow provider exceeds any fees owed to the Exchange, such amounts may be paid directly by the Exchange to the member order flow provider pursuant to payment parameters that the specialist establishes.

The Exchange believes that this proposal may raise issues similar to those raised by the payment-for-order-flow proposals that the Boston Stock Exchange,<sup>3</sup> the Chicago Stock Exchange,<sup>4</sup> the Cincinnati Stock Exchange,<sup>5</sup> the National Association of Securities Dealers, Inc.,<sup>6</sup> and the Chicago Board Options Exchange, Inc.<sup>7</sup> have submitted. Accordingly, the Exchange anticipates issuing a circular to members discussing the disclosure and best execution obligations of members who receive payments under the program.

The Exchange believes that the implementation of the program is necessary to promote the Exchange's competitiveness within the exchange-traded equity options marketplace. Any changes to this proposal, including those affecting the size of the fee or the inclusion or exclusion of any class of option in the program, will be subject to a separate filing with the Commission pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>8</sup>

##### **2. Statutory Basis**

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>9</sup> and in particular furthers the objectives of Section 6(b)(4) of the Act,<sup>10</sup> in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

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

The Exchange believes that the proposed rule change will not 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.

<sup>3</sup> Securities Exchange Act Release No. 40591 (Oct. 22, 1998), 63 FR 58078 (Oct. 29, 1998).

<sup>4</sup> Securities Exchange Act Release No. 38237 (Feb. 4, 1997), 62 FR 6592 (Feb. 12, 1997).

<sup>5</sup> Securities Exchange Act Release No. 39395 (Dec. 3, 1997), 62 FR 65113 (Dec. 10, 1997).

<sup>6</sup> Securities Exchange Act Release No. 41174 (Mar. 16, 1999), 64 FR 14035 (Mar. 23, 1999).

<sup>7</sup> Securities Exchange Act Release No. 43112 (Aug. 3, 2000), 65 FR 49040 (Aug. 10, 2000).

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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

<sup>10</sup> 15 U.S.C. 78f(b)(4).

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

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

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>11</sup> and Rule 19b-4(f)(2) thereunder.<sup>12</sup> At any time within 60 days of the filing of this proposed rule change, the Commission may summarily abrogate this 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 the furtherance of the purposes the Act.

### IV. Solicitation of Comments

The Commission has frequently raised serious concerns about payment for order flow and internalization.<sup>13</sup> Payment for order flow is of concern because brokers who are paid to send their customers' orders to one exchange have a conflict of interest that may reduce their commitment to the duty they owe their customers to find the best execution available. While payment for order flow has been a common practice in the equities markets for some time, only recently has payment for order flow developed in the options markets. Despite these concerns, however, the Amex's proposal involves the imposition of a fee and the Act gives exchanges wide latitude to establish, revise, and collect fees and other charges without prior Commission approval. The Commission invites interested persons to submit written data, views and arguments concerning the foregoing, including whether the proposed rule is consistent with the Act. In particular, the Commission asks persons who submit comments whether the payment for order flow facilitated by the Amex's proposal raises greater or different concerns than payment for order flow at other option exchanges. After receiving comments, and at any time within 60 days from the date the Amex filed its proposal, the Commission can decide to require the Amex to stop collecting the fee, refile

the proposal, and await Commission approval before reinstituting the fee.

Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 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 No. SR-AMEX-00-38 and should be submitted by September 28, 2000.

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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**BILLING CODE 8010-01-M**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43226; File No. SR-CBOE-00-33]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by the Chicago Board Options Exchange, Inc. Amending the Exchange's Fee Schedule To Impose a Fee on the Designated Primary Market-Maker for Transacting in Options on the CBOE Mini-NDX Index for Its Proprietary Account

August 29, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on July 31, 2000, the Chicago Board Options Exchange, Inc. ("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 fee schedule to require the Designated Primary Market-Maker ("DPM"), who transacts options on the reduced-value of the Nasdaq-100 Index ("MNS<sup>SM</sup>") for its proprietary account, to pay a new exchange fee of \$0.25 per contract.<sup>2</sup> The text of the proposed rule change may be examined at the places specified in Item IV below.

### 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. 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

On July 10, 2000, the Commission approved the listing and trading by the CBOE of the MNX product.<sup>3</sup> The purpose of the proposed rule change is to require the DPM, who trade the MNX product for its proprietary account, to pay a new exchange fee of \$0.25 per contract.

Currently, all DPMs are charged \$0.19 per contract for transactions for their proprietary accounts. The Exchange proposes that the DPM trading the MNX product be charged an additional fee of \$0.25 per contract, totaling \$0.44 per contract. This new fee would be used to assist the Exchange in offsetting some of the royalty fees that the Exchange must pay to the Nasdaq Stock market ("Nasdaq") for permission to trade the MNX product.

The Exchange believes that this new fee is reasonable and justified because the DPM for the MNX product has been awarded special status for the product (*i.e.*, the DPM status) and thus, stands to

<sup>2</sup> The CBOE started trading the MNX product on August 14, 2000. The reduced-value of the Nasdaq-100 index is equal to one-tenth of the current value of the Nasdaq-100 index. See Securities Exchange Act Release No. 43000 (June 30, 2000), 65 FR 42409 (July 10, 2000) (SR-CBOE-00-15).

<sup>3</sup> *Id.*

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>12</sup> 17 CFR 240.19b-4(f)(2).

<sup>13</sup> See Securities Exchange Act Release No. 43177 (August 18, 2000), 65 FR 51889 (Aug. 25, 2000); Securities Exchange Act Release No. 43112 (Aug. 3, 2000), 65 FR 49040 (Aug. 10, 2000); Securities Exchange Act Release No. 42450 (Feb. 23, 2000), 65 FR 10577 (Feb. 28, 2000); Securities Exchange Act Release No. 34902 (Oct. 27, 1994), 59 FR 55006 (Nov. 2, 1994). See also Securities Exchange Act Release No. 43084 (July 28, 2000).

<sup>14</sup> 17 CFR 200.30-3(a)(12).

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