

applicable to a national securities exchange.<sup>7</sup> In particular, the Commission finds that the proposed rule change and Amendment No. 1 are consistent with section 6(b)(4) of the Act<sup>8</sup> in that it provides for the equitable allocation of reasonable dues, fees, and other charges among Exchange members, issuers, and other persons using its facilities.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act<sup>9</sup>, that the proposed rule change (File No. SR-Amex-2001-26) and Amendment No. 1 be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45253; File No. SR-Amex-2001-92]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC To Simplify the Manner in Which a Contrary Exercise Advice Is Submitted and To Extend by One Hour the Time for Members To Submit Customer's Contrary Exercise Advices

January 8, 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 October 29, 2001, 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 amended its proposal on December 17, 2001.<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 Amex proposes to amend Amex Rule 980 to: (i) Simplify the manner in which a Contrary Exercise Advice is submitted to the Exchange; and (ii) to extend by one hour the cut-off time by which members must submit to the Exchange Contrary Exercise Advice notices for customer accounts.

The text of the proposed rule change is available at the Amex and 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 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 OCC, the issuer of all Amex traded options contracts, has an established procedure for options holders wishing to exercise in-the-money options before they expire. Known as Ex-by-Ex, the procedure provides for the automatic exercise at expiration of any equity options contract that is  $\frac{3}{4}$  of a point or more in-the-money for customer accounts or  $\frac{1}{4}$  point or more in-the-money for any other accounts. All options holders who wish to have their options contracts exercised in accordance with the Ex-by-Ex procedure need to take no further action; those contracts that are in-the-money by the appropriate amount will be automatically exercised. Options holders who do not wish to have their

options automatically exercised, or do wish options to be exercised that do not fit within the parameters of the Ex-by-Ex procedure, must file with the Exchange a Contrary Exercise Advice pursuant to Exchange Rule 980, and instruct OCC of their contrary intention. Members and member organizations satisfy the filing requirement by manually submitting a Contrary Exercise Advice Form or by electronically submitting the Advice Form through OCC's Clearing Management and Control System (C/MACS). Exchange Rule 980 is designed to deter individuals from taking improper advantage of late-breaking news by requiring evidence of an option holder's intention to exercise or not exercise expiring equity options via the submission of a Contrary Exercise Advice.

On occasion, OCC has had to suspend use of its Ex-by-Ex procedure, such as when trading in the underlying stock has been halted, or if there is no accurate price available to be used in the determination of the closing price. When this occurs and there is no automatic exercise, all options contract holders must send exercise instructions to OCC if they wish to exercise, regardless of whether the option is in or out-of-the-money. When OCC suspends its Ex-by-Ex procedure for an option class, Exchange Rule 980 currently requires the submission of a Contrary Exercise Advice. Thus, when OCC has waived the Ex-by-Ex procedure, option holders must determine what price would have been used, even though the only available price might be a stale last sale price (a price OCC did not feel comfortable using). They then must determine whether a Contrary Exercise Advice needs to be submitted to the Exchange, evidencing the option holder's intention to exercise or not exercise.

The Amex has long viewed this process as cumbersome and confusing to options holders. Therefore, the Amex now proposes to amend Exchange Rule 980 to eliminate the requirement that a Contrary Exercise Advice be submitted if the holder does not want to exercise the option when OCC has waived its Ex-by-Ex procedure for that options class. As a result, when Ex-by-Ex has been waived, submission of instructions to exercise is only required when the options holder wants to exercise the option contract. The Amex clarifies that the applicable underlying security price in such instances will be as described in OCC Rule 805(1), which is normally the

<sup>7</sup> In approving this proposed rule change, 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>8</sup> 15 U.S.C. 78f(b)(4).

<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</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 from Jeffrey P. Burns, Assistant General Counsel, Amex, to Jennifer L. Colihan, Special Counsel, Division of Market Regulation, Commission, dated December 14, 2001 ("Amendment No. 1"). In Amendment No. 1, the Amex clarified its purpose to modify the Exchange's Contrary Exercise Advice procedure set forth in proposed paragraph (g) of Amex Rule 980.

In addition, the Amex revised proposed paragraph (d) of Amex Rule 980 to clarify that in cases where the Exercise-by-Exception or "Ex-by-Ex" procedure has been waived and members and member organizations submit an affirmative Exercise Notice to the Options Clearing Corporation ("OCC") to exercise the options, the applicable underlying security price in such instances will be as described in OCC Rule 805(1), which is normally the last sale price in the primary market for the underlying security.

last sale price in the primary market for the underlying security.<sup>4</sup>

In addition, the Exchange proposes to extend the cut-off time for members to deliver Contrary Exercise Advices for customer accounts to the Exchange by one hour (from 5:30 p.m. to 6:30 p.m. EST). Currently, members are required to submit Contrary Exercise Advices to the Exchange and OCC no later than 5:30 p.m. (EST). However, because determination of final settlement prices is sometimes delayed and members need to confirm exercise instructions with customers, it is sometimes difficult for firms to deliver customer Contrary Exercise Advices in satisfaction of the 5:30 p.m. (EST) cut-off time. Accordingly, members must immediately process customer Contrary Exercise Advices to submit them to the Exchange simultaneously upon receipt of the instructions from customers in order to meet the Contrary Exercise Advice cut-off time. Accordingly, to provide members with sufficient time to process Contrary Exercise Advices for customers accounts, the Exchange proposes to extend the cut-off time for members to deliver Contrary Exercise Advices for customer accounts to the Exchange by one hour (from 5:30 p.m. to 6:30 p.m. EST). The Exchange believes it is appropriate to extend the cut-off time for member submission of customer Contrary Exercise Advices, and any cancellation thereof, to the Exchange as all decisions to exercise (or not exercise) must still be made by 5:30 p.m. (EST) in accordance with Exchange Rule 980.

Furthermore, the Amex believes that customers and member firms should have added flexibility in connection with the delivery of a Contrary Exercise Advice cancel<sup>5</sup> when the Exchange announces a modified time for the close of trading in equity options.<sup>6</sup> Currently, the delivery of a Contrary Exercise Advice or Advice cancel is required on the business day preceding the expiration date for the expiring option. Instead of a final cut-off time of 5:30 p.m., the Exchange proposes to allow a time period of 1 hour and 28 minutes after the announced close of trading for accounts of members and member firms to make a final decision whether to exercise or not exercise an expiring

option and to deliver the Contrary Exercise Advice or Advice cancel. In addition, the Exchange proposes that customers be able to make a final decision on whether to exercise or not exercise an expiring option within 1 hour and 28 minutes following the time announced for the close of trading rather than an established time of 5:30 p.m., and that members and member firms acting as an agent for customer accounts have a time period of 2 hours and 28 minutes after the close of trading instead of the current 6:30 p.m. to deliver a Contrary Exercise Advice or Advice cancel to the Exchange. The Exchange believes that the extension of time to deliver a Contrary Exercise Advice for customer accounts will benefit customers and make the process easier to administer. Moreover, the Amex feels that the proposed time periods for the delivery of a Contrary Exercise Advice or Advice cancel to the Exchange rather than a designated time when there is a modified time for the close of trading for expiring options will permit customers and member firms to better deliver their intentions whether to exercise the option. To address unusual circumstances, the proposed rule would give the Exchange the ability to establish different exercise cut-off times on a case-by-case basis.

## 2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with section 6(b) of the Act<sup>7</sup> in general, and furthers the objectives of section 6(b)(5) of the Act<sup>8</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of change, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

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

The Exchange does not believe that the proposed rule change, as amended, 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.

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

<sup>8</sup> 15 U.S.C. 78f(b)(5).

## 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, as amended, 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 No. SR-Amex-2001-92 and should be submitted by [insert date 21 days from date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

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

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<sup>4</sup> Id.

<sup>5</sup> An Advice cancel refers to a cancellation of the Contrary Exercise Advice. Telephone conversation between Jeffrey P. Burns, Assistant General Counsel, Amex, and Jennifer L. Colihan, Special Counsel and Cyndi N. Nguyen, Attorney, Commission on December 21, 2001.

<sup>6</sup> See Amendment No. 1, *supra* note 3.

<sup>9</sup> 17 CFR 200.30-3(a)(12).