

The Exchange will calculate the Select Utility Index and, similar to other stock index values published by the Exchange, the value of the Select Utility Index will be calculated continuously and disseminated every fifteen (15) seconds on the Consolidated Tape Association's Network B.

Because the Select Utility Index Notes are linked to a portfolio of equity securities, the Amex's existing equity floor trading rules will apply to the trading of the Notes. First, pursuant to Amex Rule 411, the Exchange will impose a duty of due diligence on its members and member firms to learn the essential facts relating to every customer prior to trading the Notes.¹⁶ Second, the Notes will be subject to the equity margin rules of the Exchange.¹⁷ Third, the Exchange will, prior to trading the Notes, distribute a circular to the membership providing guidance with regard to member firm compliance responsibilities (including suitability recommendations) when handling transactions in the Notes and highlighting the special risks and characteristics of the Notes. With respect to suitability recommendations and risks, the Exchange will require members, member organizations and employees thereof recommending a transaction in the Notes: (1) To determine that such transaction is suitable for the customer, and (2) to have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of such transaction. In addition, Merrill Lynch will deliver a prospectus in connection with the initial sales of the Notes.

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Notes. Specifically, the Amex will rely on its existing surveillance procedures governing equities, which have been deemed adequate under the Act. In addition, the Exchange also has a general policy, which prohibits the distribution of material, non-public information by its employees.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended is consistent with section 6 of the Act¹⁸ in general and furthers the objectives of

section 6(b)(5)¹⁹ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanisms 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

The Exchange did not receive any written comments on 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 self-regulatory organization consents, the Commission will:

A. By order approve the proposed rule change, as amended, or

B. Institute proceedings to determine whether the proposed rule change, as amended, 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. Comments may also be submitted electronically to the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-Amex-2004-02. The file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, 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. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to the File No. SR-Amex-2004-02 and should be submitted by March 15, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.²⁰

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49240; File No. SR-Amex-2003-21]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto by the American Stock Exchange LLC Relating to At-the-Close Orders and Auxiliary Opening Procedures

February 12, 2004.

On March 27, 2003, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to (1) to adopt Amex Rule 131A to set forth Exchange rules and procedures regarding at-the-close orders; (2) to amend Amex Rules 131 and 156 relating to at-the-close orders; (3) to implement additional procedures, relating to daily at-the-close procedures and expiration day auxiliary opening procedures; and (4) to adopt Amex Rule 118(m) to reflect procedures applicable to at-the-close orders in Nasdaq securities traded on the Exchange pursuant to unlisted trading privileges. On September 10, 2003, the Amex amended the proposed rule change.³ On October 20, 2003, the

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated September 9, 2003 ("Amendment No. 1").

¹⁶ Amex Rule 411 requires that every member, member firm or member corporation use due diligence to learn the essential facts, relative to every customer and to every order or account accepted.

¹⁷ See Amex Rule 462 and Section 107B of the Company Guide.

¹⁸ 15 U.S.C. 78f(b).

¹⁹ 15 U.S.C. 78f(b)(5).

Amex amended the proposed rule change.⁴ On November 14, 2003, the Amex amended the proposed rule change.⁵

The proposed rule change and Amendment Nos. 1, 2, and 3 were published for comment in the **Federal Register** on November 28, 2003.⁶ The Commission received no comments on the proposal. On January 9, 2004, the Amex filed Amendment No. 4 to the proposed rule change.⁷ This order approves the proposed rule change.

In the filing, the Amex states that the proposed rule change consolidates current Exchange procedures regarding MOC and LOC orders in Rule 131A. In addition, paragraph (m) of Rule 118 establishes MOC and LOC procedures for Nasdaq securities that are substantially similar to the procedures proposed in Rule 131A. Amex is implementing an MOC Imbalance Calculation Policy and amending its MOC Imbalance Publication Policy so that it more closely resembles the New York Stock Exchange's ("NYSE") policy as set out in NYSE Rule 123C(5). The Amex states that the most salient feature of the revised policies is the additional dissemination of an imbalance at 3:50 p.m.

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.⁸ The Commission believes that the proposed rule change is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of section 6(b)(5),¹⁰ 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest. Specifically, the Commission believes that the Amex's proposal to amend its rules governing at-the-close orders and auxiliary opening procedures on the Exchange may provide useful information to market participants and may minimize price volatility on the close. In addition, the Commission believes that the proposed rule change may result in the public dissemination of information that more accurately reflects the trading in a particular security on the Exchange at the close.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act¹¹, that the proposed rule change (SR-Amex-2003-21) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49241; File No. SR-CBOE-2003-56]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Inc. Relating to the Exemption of Standardized Options From the Securities Act of 1933 and Provisions of the Securities Exchange Act of 1934

February 12, 2004.

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 December 3, 2003, the Chicago Board Options Exchange, Inc. ("Exchange" or "CBOE") 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 proposed rule change has been filed by CBOE under Rule 19b-4(f)(6) under the Act.³ On January 2, 2004, CBOE filed Amendment No. 1 to the proposed rule change.⁴ 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

CBOE proposes to amend its rules to reflect the Commission's recent adoption of Rule 238 under the Securities Act of 1933 (the "Securities Act")⁵ and Rule 12a-9 under the Act,⁶ which together exempt standardized options issued by a registered clearing agency and traded on a registered national securities exchange or on a registered national securities association from most of the provisions of the Securities Act and from the registration requirements of Section 12 of the Act.⁷ The text of the proposed rule change is available at the Exchange and at the Commission.

I. 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 parts of such statements.

³ 17 CFR 240.19b-4(f)(6).

⁴ See letter from David Doherty, Attorney, Legal Division, CBOE, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, December 30, 2003 ("Amendment No. 1"). In Amendment No. 1, CBOE deleted proposed revisions to CBOE Rule 9.21(a)(iv) and its description.

⁵ 17 CFR 230.238.

⁶ 17 CFR 240.12a-9.

⁷ 15 U.S.C. 78l. See also Exemption for Standardized Options From Provisions of the Securities Act of 1933 and From the Registration Requirements of the Securities Exchange Act of 1934, Securities Act Release No. 8171 and Securities Exchange Act Release No. 47082 (December 23, 2002), 68 FR 188 (January 2, 2003) ("Commission Release").

⁴ See letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated October 17, 2003 ("Amendment No. 2").

⁵ See letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated November 13, 2003 ("Amendment No. 3").

⁶ See Securities Exchange Act Release No. 48813 (November 20, 2003), 68 FR 66898.

⁷ See letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated January 8, 2004 ("Amendment No. 4"). In Amendment No. 4, the Amex revised the text of the proposed rule change to correct a number of typographical errors. This was a technical amendment and is not subject to notice and comment.

⁸ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ 15 U.S.C. 78s(b)(2).

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.