

#### 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 April 16, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

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

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47531; File No. SR-Amex-2002-33]

#### Self-Regulatory Organizations; American Stock Exchange LLC; Order Approving Proposed Rule Change as Amended by Amendment No. 1 Thereto Relating to Proprietary Order Routing Facilities for Amex Listed Options and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 Thereto

March 19, 2003.

#### I. Introduction

On April 16, 2002, 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")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to

prohibit members from using facilities that are not owned or operated by the Exchange to transmit orders electronically from the Amex floor to other exchanges through a direct electronic link, and to receive orders transmitted electronically to the Amex floor from other exchanges through a direct electronic link for the purchase or sale of Amex listed options after the complete implementation of the permanent intermarket linkage in the options market ("Options Linkage"). On April 30, 2002, Amex submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> The proposed rule change, as amended, was published in the **Federal Register** on May 8, 2002.<sup>4</sup> The Commission received one comment letter on the proposed rule change.<sup>5</sup> On May 28, 2002, Amex submitted Amendment No. 2 to the proposed rule change.<sup>6</sup> On September 13, 2002, Amex submitted a response to the ISE Letter.<sup>7</sup> On December 30, 2002, Amex submitted an additional response to the ISE Letter.<sup>8</sup> This order approves the amended proposed rule change, provides notice of filing of Amendment No. 2 and grants accelerated approval to Amendment No. 2.

#### II. Description of the Proposal and Amendment No. 2

As originally filed, Amex proposed to prohibit members from using facilities that are not owned or operated by the Exchange to transmit orders<sup>9</sup> electronically from the Amex floor to other exchanges through a direct electronic link, and to receive orders transmitted electronically to the Amex floor from other exchanges through a

direct electronic link for the purchase or sale of Amex listed options upon the complete implementation of the Options Linkage.<sup>10</sup>

In Amendment No. 2, Amex limited the proposed rule change to apply only to facilities and services of another registered exchange on the Amex floor that provide a direct electronic link to the other exchange. The proposed rule change would not alter the current ability of members and member organizations, with the prior written approval of Amex, to use an electronic order routing facility or service owned and operated by a registered broker-dealer to transmit orders for Amex listed options to another registered exchange for execution.

#### III. ISE Letter and Amex Responses

##### ISE Letter

In the ISE Letter, ISE argues that Amex's proposal has significant customer protection and competitive implications because it would require an Amex floor broker that sees an ISE price that is superior to the Amex price to route the order off-floor for transmission to the ISE. ISE believes the delay caused by off-floor transmissions raises serious risks that the ISE market may not be available when the customer order reaches ISE. In addition, ISE believes the Amex floor broker may determine that the delay makes the possibility of ISE execution too risky and may execute the order on the Amex at the inferior price. ISE points out that once the Options Linkage is implemented, the Amex broker could incur trade-through liability if the broker executes the order on the Amex at the inferior price.

ISE argues that in limiting members' ability to send orders electronically to other markets, the Amex impedes competition because, without this limitation, free market forces and price competition would lead to the sending of order flow to exchanges displaying superior prices. ISE stated its view that, under the proposal, market makers could use only the Options Linkage to access competing exchanges electronically, even if there may be more efficient methods of access, and that the Options Linkage will provide only limited access because: (1) Brokers will not have direct access to the Options Linkage; (2) market makers are prohibited from using the Options Linkage as an order delivery system for

<sup>3</sup> See letter from Geraldine M. Brindisi, Vice President and Corporate Secretary, Amex, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 29, 2002 ("Amendment No. 1"). In Amendment No. 1, Amex included the text of the proposed rule change.

<sup>4</sup> See Securities Exchange Act Release No. 45864 (May 2, 2002), 67 FR 30985.

<sup>5</sup> See letter from Michael J. Simon, Senior Vice President and Secretary, International Securities Exchange, Inc. ("ISE"), to Jonathan Katz, Secretary, Commission, dated May 28, 2002 ("ISE Letter").

<sup>6</sup> See letter from Geraldine M. Brindisi, Vice President and Corporate Secretary, Amex, to Nancy J. Sanow, Assistant Director, Division, Commission, dated May 24, 2002 ("Amendment No. 2").

<sup>7</sup> See letter from Bill Floyd-Jones, Assistant General Counsel, Amex, to Deborah Flynn, Division, Commission, dated September 13, 2002 ("Amex Initial Response").

<sup>8</sup> See letter from Bill Floyd-Jones, Assistant General Counsel, Amex, to Deborah Flynn, Division, Commission, dated December 27, 2002 ("Amex Supplemental Response").

<sup>9</sup> These facilities cannot be used for listed equities and Exchange-Traded Funds as the Intermarket Trading System serves as the mechanism for routing trading interest in these securities between exchanges.

<sup>10</sup> The Commission approved the Plan for the Purpose of Creating and Operating an Intermarket Options Linkage ("Linkage Plan") in July 2000. See Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000).

<sup>18</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.

customer orders; and (3) the number of principal orders market makers may send through the Options Linkage is restricted. ISE claims that Amex wrongly implies that the Options Linkage would render obsolete the need for proprietary access systems.

#### *Amex Initial Response*

In the Amex Initial Response, Amex stated that it had addressed ISE's concerns in Amendment No. 2. In Amendment No. 2, Amex clarified that, after the Options Linkage is implemented, Amex members would continue to have electronic access to ISE from the Amex floor through broker-dealer order routing facilities; members would only be precluded from using ISE terminals on the Amex floor.

#### *Amex Supplemental Response*

In the Amex Supplemental Response, Amex responded in greater detail to ISE's concerns that the proposal is anti-competitive. Amex argues that it is not required by any applicable law or regulation to permanently maintain on its floor a separate, direct electronic link operated by the ISE to transmit orders in options to that exchange.

In addition, Amex argues that more than adequate alternative means exist for Amex member firms to route orders from the Amex floor to the ISE. Even though its use is restricted, the Options Linkage would be available. Furthermore, Amex's proposal would not alter the ability of Amex member firms to route orders from the floor of Amex to ISE using their own (or third party) proprietary order routing facilities. Amex believes the proprietary routing systems available to most, if not virtually all, Amex members on the Amex's floor are sufficiently fast and efficient that they can essentially function as an exchange-to-exchange system for orders sent from the floor of one exchange. Amex points out that not one Amex member firm has complained that the removal of the direct linkage with ISE when the Options Linkage is implemented would make it difficult for it to route orders to ISE. With respect to broker-dealers, they will have indirect access to the Options Linkage by delivering an order to the Amex specialist, who will have direct access to the Options Linkage.

#### **IV. Discussion**

After careful review, 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<sup>11</sup> and, in particular, the requirements of Section 6 of the Act<sup>12</sup> and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>13</sup> because it should remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors and the public interest.

Specifically, prohibiting Amex members from using the facilities and services of another registered exchange on the floor of the Amex as a direct electronic link to transmit orders electronically to the other exchange for the purchase or sale of listed options once the Options Linkage has been implemented is not an inappropriate burden on competition. The Commission agrees that neither the Act nor Commission rules require Amex to permit its members to have another exchange's terminals on Amex's floor to provide direct electronic access to that exchange. Finally, Amex represents that Amex members will be able to access other exchanges, as they do today, through their own or another registered broker-dealer's electronic order routing facility or service, as well as through the Options Linkage.

The Commission also finds good cause for approving Amendment No. 2 prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Amendment No. 2 clarifies and limits the scope of Amex's proposal in response to the ISE Letter. Specifically, Amendment No. 2 addresses the concern raised in the ISE Letter that the proposal would preclude an Amex member from using its own or a third party's proprietary facility to access another exchange. Accordingly, consistent with Section 19(b)(2) of the Act,<sup>14</sup> the Commission is accelerating approval of Amendment No. 2.

#### **V. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 2 to the proposed rule change, including whether Amendment No. 2 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—

<sup>11</sup> In approving this proposed rule change, the Commission notes that it has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>12</sup> 15 U.S.C. 78f.

<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> 17 CFR 240.19b-4.

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 Amendment No. 2 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 Exchange. All submissions should refer to File No. SR-Amex-2002-33 and should be submitted by April 16, 2003.

#### **VI. Conclusion**

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>15</sup> that the proposed rule change (SR-AMEX-2002-33), as amended by Amendment No. 1, is approved, and that Amendment No. 2 to the proposed rule change is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-47548; File No. SR-CBOE-2003-13]

#### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Incorporated Governing the Settlement Procedures for Index Options in Certain Unusual Circumstances**

March 20, 2003.

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 March 19, 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 Exchange. CBOE asserts that this proposal meets the criteria of

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

<sup>16</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.