

1. Before a Fund may rely on the order requested in this application, the operation of the Fund in the manner described in this application will be approved by a majority of the Fund's outstanding voting securities, as defined in the Act, or by its initial shareholder, provided that, in the case of approval by the initial shareholder, the pertinent Fund's shareholders purchase shares on the basis of a prospectus containing the disclosure contemplated by condition 2 below.

2. Each Fund relying on the requested relief will disclose in its prospectus the existence, substance and effect of any order granted pursuant to the application. In addition, each Fund will hold itself out to the public as employing the management structure described in the application. The prospectus will prominently disclose that the Adviser has the ultimate responsibility (subject to oversight by the Board) to oversee the Subadvisers and recommend their hiring, termination, and replacement.

3. At all times, a majority of the Board will be Independent Trustees, and the nomination of new or additional Independent Trustees will be at the discretion of the then-existing Independent Trustees.

4. The Adviser will not enter into a Subadvisory Agreement with any Affiliated Subadviser without that agreement, including the compensation to be paid thereunder, being approved by the shareholders of the applicable Fund.

5. When a Subadviser change is proposed for a Fund with an Affiliated Subadviser, the Board, including a majority of the Independent Trustees, will make a separate finding, reflected in the Trust's Board minutes, that the change is in the best interests of the Fund and its shareholders and does not involve a conflict of interest from which the Adviser or the Affiliated Subadviser derives an inappropriate advantage.

6. Within 90 days of the hiring of any new Subadviser, the Fund shareholders will be furnished all information about a new Subadviser that would be contained in a proxy statement, including any change in such disclosure caused by the addition of a new Subadviser. Each Fund will meet this condition by providing shareholders with an information statement meeting the disclosure requirements of Regulation 14C, Schedule 14C, and Item 22 of Schedule 14A under the Securities Exchange Act of 1934 within 90 days of the hiring of a Subadviser.

7. The Adviser will provide management services to each Fund, including overall supervisory

responsibility for the general management and investment of each Fund's portfolio, and, subject to review and approval by the Board, will: (a) Set each Fund's overall investment strategies; (b) select Subadvisers; (c) monitor and evaluate the performance of Subadvisers; (d) ensure that Subadvisers comply with each Fund's investment objectives, policies, and restrictions by, among other things, implementing procedures reasonably designed to ensure compliance; and (e) allocate and, where appropriate, reallocate a Fund's assets among its Subadvisers when a Fund has more than one Subadviser.

8. No trustee or officer of the Trust, or director or officer of the Adviser will own directly or indirectly (other than through a pooled investment vehicle that is not controlled by such person) any interest in a Subadviser except for: (a) Ownership of interests in the Adviser or any entity that controls, is controlled by, or is under common control with the Adviser; or (b) ownership of less than 1% of the outstanding securities of any class of equity or debt of a publicly-traded company that is either a Subadviser or an entity that controls, is controlled by, or is under common control with a Subadviser.

9. Any change to a Subadvisory Agreement that would result in an increase in the overall management and advisory fees payable by the Fund will be approved by the shareholders of the Fund.

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45929; File No. SR-Amex-2001-74]

Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval to Proposed Rule Change as Amended by Amendment Nos. 1 and 2 and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 3 to Proposed Rule Change Relating to the Codification of the Exchange's Auto-Ex Policy and Calculation of the NBBO for Use in Auto-Ex

May 15, 2002.

I. Introduction

On September 10, 2001, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change³ relating to disengagement of the Exchange's automatic execution system ("Auto-Ex"), and declaring quotes from away markets unreliable. On January 31, 2002 and April 8, 2002, Amex submitted Amendment Nos. 1⁴ and 2⁵ to the proposed rule change, respectively. The proposed rule change, as amended by Amendment Nos. 1 and 2, was published for comment in the **Federal Register** on April 15, 2002.⁶

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Exchange filed this proposed rule change pursuant to the requirements of Section IV.B.h.(i)(bb) of the Commission's September 11, 2000 Order Instituting Public Administrative Proceedings Pursuant to Section 19(h)(1) of the Act, which required the Amex (as well as the other floor-based options exchanges) to adopt new, or amend existing rules concerning automatic quotation and execution systems which specify the circumstances, if any, by which automated execution systems would be disengaged or operated in any manner other than the normal manner set forth in the exchange's rules; and, requires the documentation of the reasons for each decision to disengage an automatic execution system or operate it in any manner other than the normal manner. *See* Securities Exchange Act Release No. 43268 (September 11, 2000), Administrative Proceeding File No. 3-10282.

⁴ *See* letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Elizabeth King, Associate Director, Division of Market Regulation ("Division"), Commission, dated January 30, 2002 ("Amendment No. 1"). Amendment No. 1 supersedes and replaces the original filing in its entirety.

⁵ *See* letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Elizabeth King, Associate Director, Division, Commission, dated April 1, 2002 ("Amendment No. 2").

⁶ *See* Securities Exchange Act Release No. 45711 (April 9, 2002), 67 FR 18274 (April 15, 2002).

The Commission received no comments on the amended proposal. On May 10, 2002, Amex submitted Amendment No. 3 to the proposed rule change.⁷ This order approves the proposed rule change, as amended by Amendment Nos. 1 and 2. In addition, the Commission is publishing this notice to solicit comments on Amendment No. 3 from interested persons, and approving Amendment No. 3 on an accelerated basis.

II. Description of the Proposal

The Exchange proposes to codify in Amex Rule 933(c) its current practices and policies by specifying (i) the circumstances under which Auto-Ex can be disengaged or operated in a manner other than the normal manner set forth in Exchange rules and policies; and (ii) the required documentation of the reasons for any actions to disengage Auto-Ex or to operate in a manner other than normal. The following are specific instances where Auto-Ex may be disengaged or operated in other than the normal manner.

Temporary Disengagement of Auto-Ex During Market Data Delays

The Exchange's Market Operations Division reviews on a case-by-case basis, in consultation with the Exchange's Floor Governors, when deciding to disengage Auto-Ex due to market data delays either at the Options Price Reporting Authority ("OPRA") or internally at the Amex. Market Operations can disengage Auto-Ex for one option class, a group of option classes, or all option classes floor-wide. Market data delays can include delays in: (i) The Exchange disseminating quotations or last sale information to OPRA; (ii) receiving information from OPRA to be displayed on the trading floor or used to calculate the best bid or offer; or (iii) receiving market information regarding the underlying security. Senior Market Operations staff, together with the Floor Governors, review each market data delay individually and make a determination to disengage Auto-Ex based on specific facts. Auto-Ex is re-engaged as soon as the market data delay has ended.

Disengagement of Auto-Ex due to market data delays is documented in each instance in the Systems Support

Log. The Log notes the class(es) affected by the market data delay, time the disengagement started and ended, the reason for the determination and the Floor Governor(s) involved in the determination. If Auto-Ex is re-engaged during that trading day, the time of re-engagement is noted on the Log and if the re-engagement is for a reason other than the cessation of the market data delay, the reason is also noted in the Log.

Temporary Disengagement of Auto-Ex Pursuant to the Unusual Market Exception

Rule 11Ac1-1(b)(3) under the Act⁸ and Exchange Rule 948A(d) ("Firm Quote Rules") provide that if the Exchange determines that the level of trading activity or the existence of unusual market conditions is such that the Exchange is incapable of collecting, processing and making available quotation data in a manner that accurately reflects the current state of the market, the Firm Quote Rule obligations imposed on the Exchange and its member shall be suspended (an "Unusual Market Exception"). The Market Operations staff, in consultation with a Floor Official, may determine to disengage Auto-Ex for the duration of the Unusual Market Exception. Documentation of this disengagement of Auto-Ex must be maintained in either the Systems Support Log or the Service Desk Log depending on the cause of the unusual market condition. The Log notes the class(es) affected by the Unusual Market Exception, the time the disengagement started and ended, the reason for the determination, and the Floor Official involved in the determination. If Auto-Ex is re-engaged during that trading day, the time of re-engagement is noted on the Log and if the re-engagement is for a reason other than the cessation of the Unusual Market Exception, the reason is also noted in the Log.

Temporary Disengagement of Auto-Ex During Unusual Market Conditions or Systems Malfunctions

The Market Operations Division, with Floor Governor or Senior Supervisory Official approval, may disengage Auto-Ex during unusual market conditions in respect of an option class(es) or their underlying security(ies). Unusual market conditions may include (i) significant or market disruptive order imbalances in the option class or series, or the underlying security;⁹ or (ii)

unusually wide or market disrupting spreads between the bid and the offer in the underlying security. Documentation of the disengagement of Auto-Ex due to unusual market conditions is made in the Service Desk Log.

In Amendment No. 3, Amex proposes to clarify that unusual market conditions will vary, depending upon trading conditions in the option and/or its underlying security. There are no rules in the markets for the underlying securities requiring spreads between the bid and offer to be within specific parameters, however, depending upon the volatility and liquidity of the underlying security, its spread is usually within a specific range, which can be considered normal for that security. A decision to disengage Auto-Ex would occur when the spreads between the bid and the offer in a specific underlying security are wider than normal. Given the subjective nature of this determination, Market Operations will not be able to disengage Auto-Ex in this situation unless they have obtained approval of either the Senior Supervisory Officer (the Vice Chairman of the Exchange's Board of Governors), one of the four Floor Governors (members of the Exchange's Board of Governors) or one of the three Senior Floor Officials (former Governors who have remained active on the trading floor).

With respect to systems malfunctions that affect the Exchange's ability to (i) disseminate or update market quotes; or (ii) deliver orders to the trading floor in a timely manner, senior Market Operations staff determines whether to disengage Auto-Ex. Documentation of the disengagement of Auto-Ex due to systems malfunctions is made in the Systems Support Log. Both documentation Logs indicate the class(es) affected, the reason(s) for the disengagement, approval by the appropriate official (with respect to disengagement for unusual market conditions) and the time the disengagement started and ended. If Auto-Ex is re-engaged during that trading day, the time of re-engagement is noted on the Log and if the re-engagement is for a reason other than the cessation of the Unusual Market Exception, the reason is also noted in the Log.

each trading day order imbalances are required to be publicly announced. On occasion, these order imbalances are significant and may necessitate the disengagement of Auto-Ex.

⁷ See letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Elizabeth King, Associate Director, Division, Commission, dated May 9, 2002 ("Amendment No. 3"). In Amendment No. 3, Amex proposes to clarify the following: (1) The Exchange's procedures for disengaging Auto-Ex pursuant to the unusual market exception, and (2) the role of the Auto-Ex Enhancement Committee with respect to the by-pass feature of Auto-Ex.

⁸ 17 CFR 240.11Ac1-1(b)(3).

⁹ Pursuant to Exchange Rules 958A and 115 and New York Stock Exchange Rule 60, at 3:40 p.m.

Automatic By-Pass of Auto-Ex Due to an Influx of Order Executions

In certain option classes (generally the less active classes) the Exchange allows Auto-Ex to be by-passed when a specified number of automatic executions in that option class occur. The specialist determines the number of executions that can occur before this by-pass feature is activated. The specialist's determination depends on a number of factors, such as the volatility of the underlying security and amount of activity in the option class or series. However, in order to set the number of automatic executions at one, the specialist must receive the approval of a Floor Governor. Use of this feature does not relieve the specialist or registered options traders, as the responsible broker or dealer, from their obligations under Exchange Rule 958A or under Rule 11Ac1-1 under the Securities Exchange Act of 1934.¹⁰ Once the disengagement occurs, the specialist and Post Supervisor are notified immediately and Auto-Ex is generally turned back on shortly thereafter. Any extended use of the by-pass feature will need Floor Official approval and must meet the standards for either a market data delay, an Unusual Market Exception, unusual market conditions or systems malfunctions. Pursuant to the firm quote rule (Rule 958A(c)(ii)), the responsible broker or dealer, when in the process of effecting a transaction in an option class or series, is not obligated to execute a transaction when he has revised or is in the process of revising the bid, offer or quotation size. This by-pass feature provides the responsible broker or dealer with the ability to react to automatic executions in the option series or class by allowing the responsible broker or dealer to execute the order, if appropriate under the firm quote rule, at the revised bid or offer or in the amount of the revised quotation size.

In Amendment No. 3, Amex clarified that the Auto-Ex Enhancement Committee, which is comprised of the Exchange's four Floor Governors and the Chairman (or their designee) of the Specialists Association, the Options Market Makers Association and the Floor Brokers Association, will, upon the request of a specialist, review and designate which option classes or series are eligible for this by-pass feature. When making this designation, the Committee may consider such factors as the amount of trading activity in the option class or series, the average daily trading volume of the option; volatility

of the underlying security; and any other factors as the Committee deems appropriate. The Committee will determine the number of executions that can occur before this by-pass feature is activated. In addition, Market Operations staff will re-engage Auto-Ex within three minutes unless the specialist has obtained additional approvals.

Automatic By-Pass of Auto-Ex in Response to Certain Market Activity

The automatic by-pass feature provides in certain market situations for orders that are otherwise eligible for Auto-Ex to by-pass Auto-Ex and be sent to the Amex Options Display Book ("AODB") for execution handling by the specialist. Auto-Ex is by-passed in the following situations: (i) Whenever the bid or offer in a specific option series represents a limit order on the specialist's book; (ii) whenever a crossed or locked market causes an inversion in the quote; and (iii) whenever a better bid or offer is being disseminated by another options exchange.¹¹ The Amex Order File, the Exchange's host order processing system, keeps a record of each instance an otherwise eligible Auto-Ex order by-passes Auto-Ex and is sent to the AODB for execution by the specialist. This information is used by the Trading Analysis Division to monitor appropriate use of this by-pass feature.

Calculation of the NBBO for Use in Auto-Ex

A Floor Governor or Exchange Official may determine that the quotes being disseminated by another options exchange are not reliable and exclude those quotes from the calculation of the National Best Bid or Offer ("NBBO") based on one of the following circumstances: (i) The other options exchange's quotes are not firm based upon direct communication from that exchange or the dissemination through OPRA of a message indicating the quotes are not firm; or (ii) the other options exchange has directly

communicated or otherwise confirmed that it is experiencing systems or other problems affecting the reliability of its disseminated quotes.

In all cases where a Floor Governor or Exchange Official excludes an exchange or any of its quotes from the Auto-Ex determination of the NBBO due to quote unreliability, Market Operations staff will promptly notify the exchange of the action, continue to monitor the reliability of the excluded quotes in consultation with the Floor Governor or Exchange Official, and maintain records showing the date, time, duration, and reasons for each such action, as well as the identity of the Floor Governor or Exchange Official who authorized the action. Any determination to exclude a market or any of its quotes from the Auto-Ex determination of the NBBO will expire at the end of the trading day, or at such time as the quotes are confirmed by the exchange to be reliable again "whichever occurs first." Exclusion of an exchange or its quotes from the Auto-Ex determination of the NBBO will be reported to Exchange member firms.

III. Discussion

After careful review, the Commission finds that the proposed rule change, as amended by Amendment Nos. 1, 2, and 3, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange¹² and, in particular, the requirements of Section 6 of the Act¹³ and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with Section 6(b)(5) of the Act¹⁴ because it provides objective criteria and well-defined procedures for: (1) Disengaging and reengaging Auto-X, which should increase the likelihood that Auto-X will not be disengaged in a discriminatory manner; and (2) excluding another market's quote from the Amex's NBBO, which should increase the likelihood that Amex's NBBO will more accurately reflect the actual state of the market at a given time. Specifically, the Commission notes that the determination of a Floor Governor or Exchange Official to exclude unreliable quotes is limited to circumstances in which the away market has either directly communicated or confirmed that its quotes are unreliable. In this way, the discretion afforded to Amex

¹¹ In February 2001, the Exchange received Commission approval to eliminate the Auto-Ex by-pass feature in certain circumstances. See Securities Exchange Act Release No. 44013 (February 28, 2001), 66 FR 13816 (March 7, 2001). Commentary .01 to Amex Rule 933 now provides for the matching of the best bid or offer displayed by a competing market by allowing customer market and marketable limit orders to be automatically executed at that best bid or offer provided it is within the specified number of trading increments or ticks of the Amex's displayed bid or offer, and the order is within the established order size parameters. Thus, orders will no longer by-pass Auto-Ex when they can be automatically executed at the better bid or offer being disseminated by another options exchange.

¹² 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).

¹³ 15 U.S.C. 78f.

¹⁴ 15 U.S.C. 78f(b)(5).

¹⁰ 17 CFR 240.11Ac1-1.

officials to determine that another market's options quotes are unreliable is appropriately limited. Moreover, the record keeping requirements and other proposed procedures are not unreasonable.

The Commission finds good cause for approving proposed Amendment No. 3 prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Amendment No. 3 clarifies the limits on the discretion of the Exchange to disengage or operate Auto-Ex in any manner other than the normal manner and thus, raises no novel issues of regulatory concern.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 3, including whether Amendment No. 3 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-2001-74 and should be submitted by June 13, 2002.

V. Conclusion

It is Therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁵ that the proposed rule change (SR-Amex-2001-74), as amended by Amendment Nos. 1, and 2, is approved, and Amendment No. 3 is approved on an accelerated basis.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.¹⁶

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02-12897 Filed 5-22-02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45934; File No. SR-CBOE-2002-09]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to the Allocation of Orders for Appointed Market-Makers in Index FLEX Options

May 15, 2002.

I. Introduction

On February 15, 2002, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") submitted to 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 relating to the allocation of orders for Appointed Market-Makers ("AMMs") in Index FLEX Options. On March 18, 2002, the CBOE submitted Amendment No. 1 to the proposed rule change. The proposed rule change and Amendment No. 1 were published for comment in the **Federal Register** on April 2, 2002.³ The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

II. Description of Proposal

The CBOE is proposing to amend CBOE Rule 24A.5, concerning the allocation of orders in FLEX Index Options. The proposed rule change was submitted by the CBOE pursuant to subparagraph IV.B.j. of the Commission's Order of September 11, 2000,⁴ which requires that respondent options exchanges adopt new, or amend existing, rules to make express any practice or procedure "whereby market makers trading any particular option class determine by agreement * * * the allocation of orders in that option class."

CBOE Rule 24A.9 provides for the appointment of Appointed Market-Makers ("AMMs") in FLEX Index Options and assigns these AMMs certain specified obligations in the

trading of such options. The proposed rule change would amend CBOE Rule 24A.5, which relates to trading procedures for FLEX Options, to permit the appropriate Floor Procedure Committee—in this case, the SPX Floor Procedure Committee—to establish a participation entitlement formula for such AMMs.

The proposed rule change would also amend the participation entitlement of a "Submitting Member," *i.e.*, the Exchange member that initiates FLEX bidding and offering by submitting a FLEX Request for Quotes ("RFQ"). Currently, a Submitting Member who has indicated an intention to cross or act as principal on a FLEX Index Options trade, and has matched or improved the best bid or offer given in response to its RFQ, is granted priority to execute the contra side of the trade—but only to the extent of the largest of 25% of the trade, a proportional share of the trade, \$1 million Underlying Equivalent Value, or the remaining Underlying Equivalent Value on a closing transaction valued at less than \$1 million. The proposed rule change would reduce the percentage participation entitlement, where it applies, from 25% to 20%.

As part of the proposed rule change, the CBOE submitted a draft Regulatory Circular with which the SPX Floor Procedure Committee would exercise its authority to set the participation entitlement formula for AMMs.⁵ Specifically, the Regulatory Circular would state that the Submitting Member is entitled to cross up to 20% of the contracts in an order that occurs as a result of the Submitting Member's RFQ when all conditions of such percentage are met. The Regulatory Circular would state further that the AMM(s) is (are) entitled to the contracts remaining in the order up to an aggregate of 40% of the order, but that the Submitting Member and the AMM(s) could not receive an entitlement that collectively equals more than 40% of the order. The remaining contracts in the order would then be allocated according to the relevant Exchange rules.⁶

The CBOE believes that it is just and equitable for AMMs in FLEX Index Options to receive a participation entitlement in return for the obligations that are imposed upon them. The CBOE believes that such an entitlement is

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 45633 (March 22, 2002), 67 FR 15643 (April 2, 2002) ("Notice"). Although the Notice stated that the date of filing of Amendment No. 1 was March 18, 2002, the amendment was deemed filed on March 15, 2002.

⁴ Order Instituting Public Administrative Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions. Securities Exchange Act Release No. 43268 (September 11, 2000).

⁵ The Exchange has stated that changes to this Regulatory Circular, including changes to the participation entitlement formula, will be submitted to the Commission pursuant to Section 19(b) of the Act. See Notice.

⁶ The CBOE has stated that AMM(s) would not be entitled to a share in these remaining contracts unless all other participants have been satisfied. See Notice.

¹⁵ 15 U.S.C. 78s(b)(2).

¹⁶ 17 CFR 200.30-3(a)(12).