

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45972; File No. SR-Amex-2002-08]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Amendment No. 3 to a Proposed Rule Change by the American Stock Exchange LLC Relating to Specialist Unit Fees

May 21, 2002.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4² thereunder, notice is hereby given that on February 7, 2002, the American Stock Exchange LLC ("Exchange" or "Amex") 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 Amex. On March 13, 2002, the Amex submitted Amendment No. 1 to the proposed rule change.³ On March 18, 2002, the Amex submitted Amendment No. 2 to the proposed rule change.⁴ The proposed rule change, as amended by Amendment Nos. 1 and 2, was published in the **Federal Register** on April 17, 2002.⁵ The Commission received one comment on the proposed rule change.⁶ On May 16, 2002, the Amex submitted Amendment No. 3 to the proposed rule change.⁷ 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 is proposing to modify its Member Fee Schedule to pass through to Amex specialist units any fee paid by the Exchange to a third party in connection with the listing and trading of a security allocated to such specialist unit.

The text of the proposed rule change, as amended, is available at the Amex and at 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, as amended, 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

In connection with the listing and trading of certain securities on the Exchange, the Exchange may be required to pay fees to third parties as a condition to listing. For example, the Exchange may pay license fees to index providers to list index options or exchange-traded funds based on a stock index. The Exchange may also pay other types of fees to third parties in connection with a particular listing.

The Exchange proposes to pass such fees through to the Amex specialist unit allocated a security for which the Exchange pays such fees. This fee, which would be included in the Amex Member Fees Schedule under "Membership Fees," would be applicable to any securities traded on the Exchange for which the Exchange pays a fee in connection with Amex listing or trading, including equities,

options, structured products, exchange-traded funds and Trust Issued Receipts.

The Exchange currently imposes license fees on a per transaction basis applicable to specialists and registered options traders in connection with trading of options on the Nasdaq 100 Index Tracking Stock (symbol: QQQ), Nasdaq 100 Index (symbol: NDX), Mini NDX (symbol: MNX), and options on S&P 100 iShares (symbol: OEF). These fees were filed with the Commission in SR-Amex-2001-101.⁸ The Exchange represents that it will not pass through fees that the Exchange pays to third parties to the specialist unit, if the Exchange imposes a license fee on a per transaction basis with respect to the allocated security, (e.g., the Options Licensing Fee imposed under the Options Fee Schedule, as described in SR-Amex-2001-101).

The Exchange represents that any fee passed through to the specialist unit pursuant to this filing will reflect only actual costs incurred by the Exchange in connection with Exchange listing or trading of the allocated security. Such fee could be imposed in connection with any security traded on the Exchange, whether a listed security or a security traded pursuant to unlisted trading privileges. The proposed fee is not intended to cover any form of payment for order flow by the Exchange (in the event the Exchange determines to engage in such payment), and any imposition of fees on members or member organizations to permit the Exchange to recoup such payment would be filed separately with the Commission pursuant to Rule 19b-4.⁹

2. Basis

The Exchange believes the proposed rule change, as amended, is consistent with Section 6 of the Act,¹⁰ in general, and with Section 6(b)(4) of the Act,¹¹ in particular, 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. The Exchange believes that the proposed fees are equitable because they would apply to all specialists equally for all third party payments, operate on a cost recovery basis, and could not be reduced or waived by the Exchange.

⁸ See Securities Exchange Act Release No. 45163 (December 18, 2001), 66 FR 66958 (December 27, 2001).

⁹ 17 CFR 240.19b-4.

¹⁰ 15 U.S.C. 78f.

¹¹ 15 U.S.C. 78f(b)(4).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Geraldine Brindisi, Vice President and Corporate Secretary, Amex, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated March 12, 2002 ("Amendment No. 1").

⁴ See letter from Claire McGrath, Amex, to Nancy J. Sanow, Assistant Director, Division, Commission, dated March 14, 2002 ("Amendment No. 2").

⁵ See Exchange Act Release No. 45727 (April 10, 2002), 67 FR 18962. Because as described below, the Form 19b-4 submitted in Amendment No. 2 was not complete, the proposed rule change was not considered filed and thus not effective on March 18, 2002.

⁶ See letter from Brandon Becker, Wilmer, Cutler & Pickering, to Jonathan G. Katz, Secretary, Commission, dated May 2, 2002 ("May 2 Letter"). The Commission notes that the Amex responded to the issues raised in the comment letter in Amendment No. 3 to the proposed rule change. See *infra* Section II.C.

⁷ See letter from Geraldine Brindisi, Vice President and Corporate Secretary, Amex, to Nancy J. Sanow, Assistant Director, Division, Commission, dated May 16, 2002 ("Amendment No. 3"). In Amendment No. 3, the Amex responded to issues raised by a commenter identified in Item II.C. below. See also *id.* The Amex also elaborated in greater detail in its statement on the burden on competition in Item II.B. below, and modified its statutory basis for the proposed rule change as described in Item II.A.2. below. For purposes of determining the effective date and calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under

Section 19(b)(3)(C) of the Act, the Commission considers May 16, 2002 to be the effective date of the proposed rule change, the date the Amex filed Amendment No. 3. 15 U.S.C. 78s(b)(3)(C). See also note 5 *supra*.

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

The Exchange believes that the proposed Specialist Fee would impose no burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed Specialist Fee would apply to all specialists in all securities traded on the Amex for which the Amex is required to pay a fee to a third party in connection with Amex listing or trading. The Exchange represents that the proposed fee would be for cost recovery only and the Exchange could not waive or reduce the fee.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Susquehanna Investment Group ("Susquehanna") submitted a letter to the Exchange, dated March 1, 2002 regarding Susquehanna's understanding that Amex would propose to file either a new licensing fee or authorize imposition of such a fee in the future.¹² Susquehanna stated that the Amex sought to impose a fee of approximately \$5 million in connection with trading of the QQQs, for which Susquehanna is the Amex specialist. Susquehanna stated that a proposal to impose a license fee only on Susquehanna is inconsistent with Sections 6(b)(4), 6(b)(5), and 6(b)(8) of the Act;¹³ that such a proposal, to the extent it is an indirect attempt to reallocate the QQQs to another specialist, is inconsistent with Amex Rule 27(f); and that the proposed fee had not been submitted to the Amex Committee Floor Members for review under Section 9.19 of the Amex/NASD Transaction Agreement, which was implemented at the time of the merger of the Amex and the NASD in 1998. Susquehanna also stated that, even if the fee were allocated between the specialist and the crowd, the fee "would make no economic sense" under current competitive market conditions. The Amex responded in writing to the March 1 Letter on April 5, 2002, stating that the Amex Board discussed the issues raised in the March 1 Letter, and expressed its view that Amex management should continue to proceed on its current course.

An additional letter, dated May 2, 2002, was submitted to the Commission on behalf of Susquehanna by Wilmer,

Cutler & Pickering¹⁴ regarding SR-Amex-2002-08. The May 2 Letter stated that the Amex's rule change should be abrogated and noticed for comment under Section 19(b)(2) of the Act;¹⁵ that the Amex's filing did not discuss comments made in the March 1 Letter as required by Rule 19b-4¹⁶ and Form 19b-4 thereunder and did not discuss, in connection with the Statement on Burden on Competition in SR-Amex-2002-08, the March 1 Letter's statement that a licensing fee imposed on Susquehanna would be discriminatory and anti-competitive; and that the filing violates Sections 6(b)(4), 6(b)(5) and 6(b)(8) of the Act¹⁷ and Amex Rule 27(f). On May 14, 2002, Susquehanna submitted a second letter to the Exchange, which the Amex believes is substantially the same as the March 1 Letter, and attached a copy of the May 2 Letter.¹⁸

The Amex strongly believes that the proposed Specialist Fee falls squarely within existing self-regulatory organization ("SRO") precedent applicable to member fee filings made under Section 19(b)(3)(A) of the Act.¹⁹ The Amex believes that if the Commission were to accept Susquehanna's proposition, SROs would be required to delay imposing revised fees filed under Section 19(b)(3)(A) of the Act²⁰ based solely on objections by affected members. The Amex believes that this could have a significant adverse effect on an SRO's ability to conduct its business and carry out its responsibilities under the Act, including member firm surveillance, implementation of trading facilities, or development of new products and services.

The Amex believes that the Commission has provided SROs with broad discretion to impose member fees immediately upon filing, including the following recent examples:

1. Marketing and licensing fees imposed on Chicago Stock Exchange specialists, including licensing fees for ETF products;²¹

2. Options Clearing Corporation license fee imposed on clearing

members for use of risk management software package;²²

3. New York Stock Exchange ("NYSE") Regulatory Fee, under which specialists pay a total of \$16 million per year to be allocated among specialist firms based on the number of memberships affiliated with each specialist firm;²³

4. NYSE specialist allocation fee, with a maximum of \$250,000 per allocation;²⁴ and

5. Boston Stock Exchange ("BSE") pass through to specialists of all third party fees billed to BSE on behalf of specialists trading Nasdaq securities.²⁵

The Exchange believes the proposed fee change is consistent with Sections 6(b)(4), 6(b)(5), and 6(b)(8) of the Act,²⁶ as discussed below.

1. Section 6(b)(8) of the Act.²⁷ The Amex believes that the proposed Specialist Fee would impose no burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Amex represents that the proposed Specialist Fee would apply to all specialists in all securities traded on the Amex for which the Amex is required to pay a fee to a third party in connection with Amex listing or trading. The Amex asserts that the proposed fee would be for cost recovery only and the Exchange could not waive or reduce the fee. The Exchange understands that the Nasdaq Stock Market imposes a license fee on other exchanges that trade the QQQ pursuant to unlisted trading privileges, and such fee is being, or can be, passed on to the specialist on at least one regional exchange. The May 2 Letter states that increased costs to specialists "hinders their ability to offer a competitive spread" and is, therefore, inconsistent with Section 6(b)(8) of the Act.²⁸ The Exchange's rules governing specialists require the specialist to make fair and orderly markets under prevailing market conditions. The Amex believes that the existence of, or the level of, particular Exchange fees should be irrelevant to any consideration of the

²² See Securities Exchange Act Release No. 45028 (November 6, 2001), 66 FR 57141 (November 14, 2001) (SR-OCC-2001-13).

²³ See Securities Exchange Act Release No. 43726 (December 14, 2000), 65 FR 82428 (December 28, 2000) (SR-NYSE-2000-57).

²⁴ See Securities Exchange Act Release No. 43700 (December 11, 2000), 65 FR 79147 (December 18, 2000) (SR-NYSE-2000-48).

²⁵ See Securities Exchange Act Release No. 44971 (October 23, 2001), 66 FR 54557 (October 29, 2001) (SR-BSE-2001-06).

²⁶ 15 U.S.C. 78f(b)(4), 15 U.S.C. 78f(b)(5), and 15 U.S.C. 78f(b)(8).

²⁷ 15 U.S.C. 78f(b)(8).

²⁸ *Id.*

¹² See letter from Jeffrey Yass, Managing Director, Susquehanna, to Salvatore F. Sodano, Chairman and Chief Executive Officer, Amex, dated March 1, 2002 ("March 1 Letter").

¹³ 15 U.S.C. 78f(b)(4), 15 U.S.C. 78f(b)(5), and 15 U.S.C. 78f(b)(8).

¹⁴ See May 2 Letter, note 6 *supra*.

¹⁵ 15 U.S.C. 78s(b)(2).

¹⁶ 17 CFR 240.19b-4.

¹⁷ 15 U.S.C. 78f(b)(4), 15 U.S.C. 78f(b)(5), and 15 U.S.C. 78f(b)(8).

¹⁸ See letter from Jeffrey Yass, Managing Director, Susquehanna, to Salvatore F. Sodano, Chairman and Chief Executive Officer, Amex, dated May 14, 2002.

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ *Id.*

²¹ See Securities Exchange Act Release No. 45282 (January 15, 2002), 67 FR 3517 (January 24, 2002) (SR-CHX-2001-30).

appropriateness of the specialist's quoted market.

2. Section 6(b)(4) of the Act.²⁹ The Amex believes that the proposed Specialist Fee does not violate Section 6(b)(4) of the Act³⁰ requirements regarding equitable allocation of dues and other charges. The Amex represents that the proposed fees would be equitable because they would apply to all specialists equally for all third party payments, operate on a cost recovery basis, and could not be reduced or waived by the Exchange. The Amex believes that the Commission has not historically involved itself with the level of fees set by an SRO for its members as long as they are equitably applied.

3. Section 6(b)(5) of the Act.³¹ The Amex believes that the proposed Specialist Fee does not violate Section 6(b)(5) of the Act³² requirements that an SRO's rules avoid unfair discrimination among dealers and promote just and equitable principles of trade. The Amex believes that the proposed Specialist Fee would not be unfairly discriminatory against Susquehanna as the QQQ specialist. As specialist, Susquehanna has the principal Exchange obligations with respect to QQQ under Amex rules, and also has the potentially largest financial reward of any member group. The Amex believes that the Act does not require that all exchange fees, or any fee in particular, be allocated among all member groups, or to all members permitted to trade a product. The Exchange, in exercise of its appropriate business discretion consistent with its SRO responsibilities under the Act, has determined that the specialist unit allocated a security should assume the burden of third party fees required to be paid by the Exchange to list a particular product.

4. Amex Rule 27(f). The Amex believes that allegations of indirect reallocation are wholly unfounded. In the event of reallocation proceedings for QQQ, or any other security, the Exchange would follow the requirements of Amex Rule 27(f).

5. The Amex/NASD Transaction Agreement. The March 1 letter also asserts that Amex Committee Floor Members are required to review the fee under Section 9.19 of the Amex/NASD Transaction Agreement. The Amex represents that the proposed Specialist Fee would not be the type of fee to which Section 9.19 applies. The

Exchange also notes that the Amex in recent years has increased a number of member fees to better align Exchange fees with the actual cost of delivering services and reduce Exchange subsidization of such services.³³ The Amex believes that the proposed Specialist Fee would be consistent with reduced or eliminated subsidies.

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

The foregoing proposed rule change, as amended, has become effective on May 16, 2002³⁴ pursuant to Section 19(b)(3)(A)(ii) of the Act³⁵ and subparagraph (f)(2) of Rule 19b-4³⁶ thereunder, because it establishes or changes a due, fee, or other charge. At any time within 60 days of May 16, 2002, the Commission may summarily abrogate such 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 furtherance of the purposes of the Act.³⁷

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, as amended, 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-2002-08 and should be submitted by June 21, 2002.

³³ See e.g., Securities Exchange Act Release Nos. 45360 (January 29, 2002), 67 FR 5626 (February 6, 2002) (SR-Amex-2001-102); and 44286 (May 9, 2001), 66 FR 27187 (May 16, 2001) (SR-Amex-2001-22).

³⁴ See *supra* note 5.

³⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

³⁶ 17 CFR 240.19b-4(f)(2).

³⁷ See 15 U.S.C. 78s(b)(3)(C).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.³⁸

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45974; File No. SR-Amex-2001-65]

Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 3 and 4 to the Proposed Rule Change Relating to the Implementation of Quick Trade

May 22, 2002.

I. Introduction

On August 22, 2001, the American Stock Exchange LLC ("Amex") 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 implement Quick Trade, an enhancement to the Amex Order File ("AOF") and Amex Options Display Book ("AODB").³ On October 19, 2001 and December 4, 2001, respectively, the Amex filed Amendment Nos. 1 and 2 to the proposed rule change. The proposed rule change, as amended, was published for comment in the **Federal Register** on December 31, 2001.⁴ The Commission received no comments on the proposal. On April 23, 2002 and May 7, 2002, respectively, the Amex filed Amendment Nos. 3 and 4 to the proposed rule change.⁵ This order

³⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The AODB is the Exchange's specialist's book.

⁴ See Securities Exchange Act Release No. 45180 (December 20, 2001), 66 FR 67585 ("Notice").

⁵ See Letters from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 25, 2002 and May 6, 2002, respectively. In Amendment No. 3, the Amex added proposed rule text to codify the ratios that would be used by Quick Trade in allocating orders among the specialist and registered options traders; eliminated "Sweep of the Book" as one of the proposed functions for which Quick Trade would be used; and elaborated on the manner in which the opening price for an options series is established. In Amendment No. 4, the Amex amended the proposed rule text submitted in Amendment No. 3 to clarify that Quick Trade would allocate orders on a rotating basis in lots of ten contracts or less. See more at *infra* note and accompanying text.

²⁹ 15 U.S.C. 78f(b)(4).

³⁰ *Id.*

³¹ 15 U.S.C. 78f(b)(5).

³² *Id.*