

The adoption of Commentary .06 to Rule 1000 and Commentary .07 to Rule 1000A would prohibit the use of non-public information received during the facilitation processes. As discussed above, facilitation orders are orders in which a member or member organization executes a crossing transaction with an order for a public customer. The facilitation rule provides procedures that allow the customer's order to be completely executed and prohibits the trading floor from supplanting the customer.

Amex states that since the proposed facilitation rule is designed to promote the interaction of orders in an open-outcry auction, the proposed rule requires the disclosure of information to the trading crowd in order to provide the crowd with an opportunity to participate in the transaction with the facilitating member. These proposed rules impose order exposure requirements on floor brokers seeking to cross buy orders and sell orders, and seek to reconcile these practices with the rules and practices of the auction market. According to Amex, affording trading crowds an opportunity to participate in transactions from which they may be excluded results in more competitive markets and executions for customers at the best available prices. In furtherance of that effort, the Exchange now seeks to codify and expand its policy that prohibits the use of non-public information, by either a member or a person associated with a member, for their own benefit, by trading in the Index Shares or in related instruments prior to that information being disclosed. Use of such non-public information by such member or associated person (regardless of whether that party ultimately completes the Index Shares transaction) is generally considered conduct inconsistent with just and equitable principles of trade.

Thus, Amex proposes to adopt provisions for both Portfolio Depositary Receipts and Index Fund Shares that state that it may be inconsistent with just and equitable principles of trade for any member or associated person, who has knowledge of all the material terms of (i) an order being facilitated, or (ii) orders being crossed, to enter an order to buy or sell an Index Share or other related instrument prior to the time the order's terms are disclosed to the trading floor crowd or the execution of the facilitated transaction can no longer reasonably be considered imminent. The term "related instrument" is defined in the proposed rules as a security comprising ten percent or more of the component securities in the Portfolio Depositary Receipt or the

Index Fund Share or a futures contract on any economically equivalent index.

Amex states that the purpose of this policy is to prevent members and associated persons from using undisclosed information about imminent Index Share transactions to trade the relevant Index Shares or any closely-related instrument in advance of persons represented in the trading crowd. Without this prohibition, such trading can threaten the integrity of the auction market or disadvantage other market participants.

## 2. Statutory Basis

The Exchange states that the proposed rule change is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b) 5 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 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 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.

## 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 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 at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-Amex-2001-46. This file number should be included on the subject line if e-mail is used. To help the Commission process and review 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 in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the principal offices of the Amex. All submissions should refer to File No. SR-Amex-2001-46 and should be submitted by February 3, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49025; File No. SR-Amex-2003-106]

### **Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC Relating to the Retroactive Application of a Monthly Options Transaction Fee Cap for Specialists and Registered Options Traders**

January 6, 2004.

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 December

<sup>8</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.

1, 2003, 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 and II below, which Items have been prepared by the Amex. On January 2, 2004, the Exchange amended the proposal.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons, and is granting accelerated approval to the proposed rule change.

### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to retroactively apply a fee cap of \$72,000 per month in any single options class for specialists and registered options traders ("ROTs") subject to options transaction fees from July 1, 2003 to November 30, 2003. The text of the proposed rule change 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 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 III 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 the Statutory Basis for, the Proposed Rule Change**

##### **1. Purpose**

The Amex proposed, in a companion filing (SR-Amex-2003-104),<sup>4</sup> to adopt a fee cap of \$72,000 per month in any single option class, exclusive of license fees, for specialists and ROTs subject to transaction fees.<sup>5</sup> With the instant

proposed rule change, Amex proposes that this fee cap be effective as of July 1, 2003 so that the Amex will retroactively apply the fee cap from July 1, 2003 to November 30, 2003. Accordingly, the Exchange will rebate to those specialists and ROTs transaction fees (exclusive of the options licensing fee) that have been paid in excess of the \$72,000 fee cap in any single option class in any one month from July 1, 2003 through November 30, 2003.

The Exchange believes that specialists and ROTs who bring in substantial order flow to the Exchange should be rewarded through the proposed fee reduction. As proposed, specialists and ROTs in any single option class will be required to trade 200,000 contracts for equity options and 232,258 contracts in index options to reach the fee cap (based on the current rate of \$0.36 per contract side). However, as indicated in SR-Amex-2003-104,<sup>6</sup> the number of contracts required to reach the fee cap in the top 300 equity options may increase as a result of the proposed market share fee program. Although the Exchange submits that only a small number of firms will likely reach these limits, the proposal is intended to provide incentives to firms to continue to attract order flow.

##### **2. Statutory Basis**

The Exchange believes that the proposed fee change is consistent with Section 6(b)(4) of the Act<sup>7</sup> regarding the equitable allocation of reasonable dues, fees and other charges among exchange members and other persons using exchange facilities.

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

The Amex believes the proposed rule change will impose no 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.

### **III. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal 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 at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-Amex-2003-106. This 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 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-2003-106 and should be submitted by February 3, 2004.

### **IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change**

The Amex has asked the Commission to approve the proposed rule change, as amended, on an accelerated basis, so that the fee reduction can be allocated in 2003 and the Amex and its member firms may close its books for the year 2003.

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, and in particular, the requirements of Section 6(b)(4) of the Act.<sup>8</sup> Specifically, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,<sup>9</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.<sup>10</sup> The

<sup>3</sup> See letter from Jeffrey P. Burns, Associate General Counsel, Amex, to Joseph P. Morra, Special Counsel, Division of Market Regulation, Commission, dated December 31, 2003 ("Amendment No. 1"). In Amendment No. 1, Amex explained that it requested accelerated approval of the filing so that the rebated monies could be allocated in 2003 for the purpose of closing the books for the year.

<sup>4</sup> See Securities Exchange Act Release No. 49019 (January 5, 2004) (File No. SR-Amex-2003-104). This proposal was filed pursuant to section 19(b)(3)(A) of the Act and was effective upon filing.

<sup>5</sup> For this purpose, transaction fees applicable to specialists and ROTs include the options

transaction fee, the options comparison fee, and the options floor brokerage fee.

<sup>6</sup> See *supra* note 4.

<sup>7</sup> 15 U.S.C. 78f(b)(4).

<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> In approving this proposal, the Commission has considered the proposed rule's impact on

Commission believes that the proposal may increase order flow to the Exchange, which should enhance liquidity on the Amex.

The Commission finds good cause for approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of the notice of filing thereof in the **Federal Register**. Specifically, the Commission notes that accelerated approval will allow the Amex and its member firms to close its books for the year 2003 without unnecessary delay. Accordingly, the Commission believes that there is good cause, consistent with Sections 6(b)(4)<sup>11</sup> and 19(b)(2) of the Act,<sup>12</sup> to approve the proposal, as amended, on an accelerated basis.

## V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>13</sup> that the proposed rule change (SR-Amex-2003-106), as amended, is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

Jill M. Peterson,

Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49017; File No. SR-Amex-2003-93]

### Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to the Listing and Trading of Notes Linked to the Annual Performance of the Standard & Poor's 500 Stock Index

January 2, 2004.

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 27, 2003, the American Stock Exchange LLC ("Amex") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which the Amex has prepared.

efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>11</sup> See *supra* note 8.

<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</sup> *Id.*

<sup>14</sup> 17 CFR 200.30-3(a)(12).

<sup>15</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposal on an accelerated basis.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to list and trade, under Section 107A of the Amex Company Guide, Targeted Efficiency Equity Securities (or "Notes") of Wachovia Corporation, the return on which is based on the performance of the Standard & Poor's 500 Stock Index,<sup>3</sup> ("S&P 500 Index"), subject to an annual reset provision and cap.

### 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 had received on the proposed rule change. The text of these statements may be examined at the places specified in Item III 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 the Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

Under section 107A of the Amex Company Guide, the Amex may approve for listing and trading securities which cannot be readily categorized under the listing criteria for common and preferred stocks, bonds, debentures, or warrants.<sup>4</sup> The Amex proposes to list Notes for trading based on the S&P 500

<sup>3</sup> The S&P 500 Index is a broad-based stock index, which provides an indication of the performance of the U.S. equity market. The S&P 500 Index is a capitalization-weighted index reflecting the total market value of 500 widely held component stocks relative to a particular base period. The S&P 500 Index is computed by dividing the total market value of the 500 stocks by an S&P 500 Index Divisor. The Index Divisor keeps the S&P 500 Index comparable over time to its base period of 1941-1943 and is the reference point for all maintenance adjustments. The securities included in the S&P 500 Index are listed on the Amex, the New York Stock Exchange, Inc., or traded through the Nasdaq Stock Market, Inc. ("Nasdaq"). The S&P 500 Index reflects the price of the common stocks of 500 companies without taking into account the value of the dividend paid on such stocks.

<sup>4</sup> See Securities Exchange Act Release No. 27753 (March 1, 1990), 55 FR 8626 (March 8, 1990) (SR-Amex-89-29).

Index.<sup>5</sup> The Notes are senior non-convertible debt securities of Wachovia that will have a term of three years.<sup>6</sup> The Notes will conform to the listing guidelines under section 107A of the Amex Company Guide<sup>7</sup> and the continued listing guidelines under sections 1001-1003 of the Amex Company Guide.<sup>8</sup>

Wachovia will issue the Notes in denominations of whole "Units," with each Unit representing a single Note. The original public offering price will be \$5 per Note. The Notes will provide for an annual calculation of the percentage change of the S&P 500 Index so that any positive performance of the S&P 500 Index during each Annual Calculation Period will be doubled subject to a maximum payment amount or ceiling. An investor in the Notes will be subject to the full extent of a negative return of the S&P 500 Index in any Annual Calculation Period. According to the Amex, the S&P 500 Index value is disseminated at least once every fifteen seconds throughout the trading day over the Consolidated Tape Association's Network B.<sup>9</sup>

<sup>5</sup> The S&P 500 Index is determined, calculated, and maintained by Standard & Poor's, a division of the McGraw-Hill Companies, Inc.

<sup>6</sup> Wachovia Corporation and Standard & Poor's have entered into a non-exclusive license agreement providing for the use of the S&P 500 by Wachovia and certain affiliates and subsidiaries in connection with certain securities, including these Notes. Standard and Poor's is not responsible for and will not participate in the creation and issuance of the Notes.

<sup>7</sup> The initial listing standards for the Notes require: (1) A minimum public distribution of one million units; (2) A minimum of 400 shareholders; (3) a market value of at least \$4 million; and (4) a term of at least one year. In addition, the listing guidelines provide that the issuer has assets in excess of \$100 million, stockholder's equity of at least \$10 million, and pre-tax income of at least \$750,000 in the last fiscal year or in two of the three prior fiscal years. In the case of an issuer that is unable to satisfy the earning criteria stated in section 101 of the Amex Company Guide, the Amex will require the issuer to have the following: (1) Assets in excess of \$200 million and stockholders' equity of at least \$10 million; or (2) assets in excess of \$100 million and stockholders' equity of at least \$20 million.

<sup>8</sup> The Amex's continued listing guidelines are set forth in sections 1001 through 1003 of part 10 to the Amex Company Guide. Section 1002(b) of the Amex Company Guide states that the Amex will consider removing from listing any security where, in the opinion of the Amex, it appears that the extent of public distribution or aggregate market value has become so reduced to make further dealings on the Amex inadvisable. With respect to continued listing guidelines for distribution of the Notes, the Amex will rely, in part, on the guidelines for bonds in section 1003(b)(iv). Section 1003(b)(iv)(A) provides that the Amex will normally consider suspending dealings in, or removing from the list, a security if the aggregate market value or the principal amount of bonds publicly held is less than \$400,000.

<sup>9</sup> Telephone conversation between Jeffrey P. Burns, Associate General Counsel, Amex, and Patrick M. Joyce, Special Counsel, Division of