

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-50953; File No. SR-Amex-2004-104)

December 30, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of  
Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange  
LLC Relating to Regulation SHO

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 13, 2004, 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 Exchange. On December 22, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Amex has filed the proposal as a “non-controversial” rule change pursuant to Section 19(b)(3)(A) of the Act<sup>4</sup> and Rule 19b-4(f)(6) thereunder,<sup>5</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

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

<sup>3</sup> See Amendment No. 1 to the proposed rule change (December 22, 2004). Amendment No. 1 replaced the Exchange’s original filing in its entirety.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>5</sup> 17 CFR 240.19b-4(f)(6). For the purposes of determining the effective date and calculating the sixty-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 that period to commence on December 22, 2004, the date that the Exchange filed Amendment No. 1 to the proposed rule change. See 15 U.S.C. 78s(b)(3)(C).

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

The Amex proposes to amend Rules 7, 27, 108, 111, 118, 205, 208, 590, 783, 784 and 957 and eliminate obsolete Rules 792, 794 and 795 to conform its rules to the requirements of Regulation SHO<sup>6</sup> under the Act. The text of the proposed rule change is available for viewing at the places specified in Item IV below.

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 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 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

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<sup>6</sup> See Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004) (the "Adopting Release"), and accompanying orders: Securities Exchange Act Release No. 50104 (July 28, 2004), 69 FR 48032 (August 6, 2004) (the "Pilot Order"), and Securities Exchange Act Release No. 50747 (November 29, 2004), 69 FR 70480 (December 6, 2004) (the "Second Pilot Order"). The Adopting Release, the Pilot Order and the Second Pilot Order are hereinafter collectively referred to as "Regulation SHO."

The Commission has adopted Regulation SHO under the Act, thereby establishing new requirements relating to short sales.<sup>7</sup> Among other things, Regulation SHO (i) requires broker-dealers to mark sales of all equity securities as “long,” “short” or “short exempt,” specifying the standards for each, (ii) provides for the establishment of a pilot program under which short sales in specific securities will take place without application of the “tick” test or any other price test, (iii) requires short sellers in all equity securities to locate securities to borrow before selling, and (iv) imposes additional delivery requirements on broker-dealers for securities in which a substantial number of failures to deliver have occurred.<sup>8</sup> The Commission has requested each SRO to review its rules and submit rule filings where necessary to conform its rules to the requirements of Regulation SHO. In order to accomplish this objective, the Exchange proposes to amend the following rules. The Exchange believes that these proposed rule changes are non-controversial and, in a number of instances, simply consist of incorporating by reference Regulation SHO or certain of its provisions or adding appropriate provisions to address the new “short exempt” order marking requirement. The operative date of the proposed rule change will be January 3, 2005, which is the operative date of the applicable provisions of Regulation SHO.

#### **Rule 7. Short Sales**

Rule 7 is the Exchange’s primary rule that applies an Exchange-based “tick” test to short sales effected on the Exchange. The Exchange proposes to amend Rule 7 to incorporate by reference all appropriate exceptions and exemptions provided by the Commission, including those under Regulation SHO and any Commission orders issued pursuant thereto,

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<sup>7</sup> See the Adopting Release.

such as the exemption for Exchange-listed securities designated as part of the Regulation SHO pilot program.<sup>9</sup> Commentary .01 to Rule 7 currently reproduces the complete text of the Commission's short sale regulation, Rule 10a-1,<sup>10</sup> for the convenience of members and member organizations. Rather than add the new text of Regulation SHO to this already lengthy Commentary, the Exchange proposes simply to reference Rule 10a-1 and Regulation SHO (including any Commission orders issued pursuant to Regulation SHO) in Commentary .01 and take this opportunity to condense the Rule by deleting the text of Rule 10a-1. The Exchange believes this is appropriate, given the opportunities that exist today for members to access the text of the Commission's rules electronically if necessary. Including the text of the Commission's regulation in the Exchange's Commentary is unusual, and it has the additional disadvantage of requiring the Exchange to submit a rule filing each time there is a change in the Commission's rule.

### **Rule 27. Allocations Committee**

Paragraph (f) of Rule 27 specifies situations under which the Exchange's Allocation Committee shall be convened to reallocate securities from one specialist to another. Paragraphs (g) and (h) of the Rule outline the procedures for the reallocation. Rule 203(b)(3) of Regulation SHO imposes a buy-in requirement with respect to certain "threshold securities" that have extended delivery failures, and there is also a pre-borrowing requirement for additional short sales of a "threshold security" if the buy-in is not completed within the time period specified in Regulation SHO.<sup>11</sup> These provisions of Regulation SHO do not

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<sup>8</sup> Id.

<sup>9</sup> See the Pilot Order and the Second Pilot Order.

<sup>10</sup> See 17 CFR 240.10a-1.

<sup>11</sup> See the Adopting Release.

provide for a specialist/market maker exception.<sup>12</sup> Consequently, the Exchange proposes to modify paragraphs (f) and (h) of Rule 27 to provide for a reallocation in the event that a specialist in a stock, ETF or other security becomes subject to a pre-borrowing requirement on short sales with respect to one of its specialty securities or, in the case of an options specialist, with respect to the underlying security, and for the restoration of the security to the original specialist if that specialist is no longer subject to a pre-borrowing requirement.

**Rule 108. Priority and Parity at Openings**

**Rule 111, Commentary .04. Restrictions on Registered Traders**

**Rule 118. Trading in Nasdaq National Market Securities**

**Rule 205. Manner of Executing Odd-Lot Orders**

**Rule 208. Bunching of Odd-Lot Orders**

**Rule 590. Part 1 General Rule Violations**

**Rule 957. Accounts, Orders and Records of Registered Traders, Specialists and Associated Persons**

The foregoing rules all require very minor and obvious changes to conform to Regulation SHO. Several of these changes involve the addition of provisions related to “short exempt” orders. In the case of Rule 118, a provision involving odd-lot orders in Nasdaq National Market securities that allows such orders to be marked “short” is being revised because it would directly conflict with the provision of Regulation SHO requiring orders that are exempt from the “tick” test to be marked “short exempt.”<sup>13</sup> In the case of Rule 957, a reference to Rule 200 of Regulation SHO will be substituted for a reference to Rule 3b-3 under the Act (which is being eliminated).

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<sup>12</sup> Id.

**Rule 783. Normal Buy-Ins****Rule 784. Mandatory Closing of Fails**

Rule 783 provides the procedures for normal buy-ins of securities traded on the Exchange, and Rule 784 provides the procedures for the mandatory closing of fails for Exchange-traded securities. The time periods and certain other provisions in these two Rules (such as the ability of a Floor Official to defer the execution of a normal buy-in under Rule 783 and the ability of the Exchange to temporarily suspend the mandatory closing in Rule 784 under unusual circumstances) are incompatible with the buy-in requirements for “threshold securities” under Regulation SHO. Consequently, the Exchange proposes to incorporate by reference the provisions of Regulation SHO into these two Rules where appropriate, making it explicit that Regulation SHO governs in the event of a conflict.

**Rule 792. Securities Transferring Out of Town****Rule 794. “Buy-Ins” on Securities Located Out of Town****Rule 795. “Buy-Ins” Where Securities in Transfer**

Rules 792, 794 and 795 all contain buy-in provisions that, as with Rules 783 and 784, may be in conflict with the buy-in provisions of Regulation SHO under certain circumstances. However, rather than modify each of these rules through incorporation by reference of the provisions of Regulation SHO, as proposed above for Rules 783 and 784, the Exchange has determined that these three rules are obsolete and no longer in use, and we instead propose that these rules be eliminated in their entirety.

**2. Statutory Basis**

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<sup>13</sup> Id.

The proposed rule change is consistent with Section 6(b) of the Act<sup>14</sup> in general and furthers the objectives of Section 6(b)(5) of the Act<sup>15</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade.

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 that is not necessary or appropriate in furtherance of the purposes of the Act.

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

The foregoing rule change, as amended, has been filed by the Exchange pursuant to Section 19(b)(3)(A) of the Act<sup>16</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>17</sup> The Exchange requests that the Commission waive the 5-day notice and 30-day pre-operative requirements contained in Rule 19b-4(f)(6)(iii)<sup>18</sup> because the proposed rule change does not (i) significantly affect the protection of investors or the

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<sup>14</sup> 15 U.S.C. 78f(b).

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

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>17</sup> 17 CFR 240.19b-4(f)(6).

<sup>18</sup> 17 CFR 240.19b-4(f)(6)(iii).

public interest; (ii) impose any significant burden on competition; or (iii) become operative for 30 days from the date on which it was filed, or such shorter time frame as the Commission may designate. The Exchange believes that good cause exists to grant such waivers because of the importance of short sale regulation to the protection of investors. The Exchange will implement the proposed rule change immediately so that they will be in effect on the operative date of the applicable provisions of Regulation SHO.

The Commission believes that waiving the 5-day notice and 30-day pre-operative delay is consistent with the protection of investors and the public interest. The Commission notes that proposed rule change being made herein simply conforms the Exchange's rules to the requirements of Regulation SHO under the Act. No new rules, policies or procedures are being proposed other than as required by Regulation SHO. The Commission believes that accelerating the operative date of the proposed rule change does not raise any new regulatory issues, significantly affect the protection of investors or the public interest, or impose any significant burden on competition. For these reasons, the Commission designates the proposed rule change as effective and operative immediately.

At any time within 60 days of the filing of such proposed rule change pursuant to Section 19(b)(3)(A) of the Act, 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.



#### 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. Comments may be submitted by any of the following methods:

##### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR–Amex–2004–104 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609.

All submissions should refer to File Number SR–Amex–2004–104. 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, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 Section, 450 Fifth Street,

NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. All comments received will be posted

without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2004–104 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>19</sup>

Jill M. Peterson  
Assistant Secretary

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<sup>19</sup> 17 CFR 200.30-3(a)(12).