

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58923; File No. SR-Amex-2008-51)

November 10, 2008

Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, Related to Amendments to Rule 991 (Communications to Customers) and Rule 921 (Opening of Accounts)

On June 25, 2008, the American Stock Exchange LLC (“Amex” or the “Exchange”)<sup>1</sup> filed with the Securities and Exchange Commission (“Commission”) a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Exchange Act”)<sup>2</sup> and Rule 19b-4 thereunder.<sup>3</sup> Amex filed Amendment Nos. 1 and 2 to the proposed rule change on August 22, 2008, and September 5, 2008, respectively.<sup>4</sup> Notice of the proposal was published for comment in the Federal Register on September 30, 2008.<sup>5</sup> The Commission received no comments on the proposed rule change. This order approves the proposed rule change, as modified by Amendment Nos. 1 and 2.

I. Description of the Proposed Rule Change

The Exchange proposed to amend Amex Rule 991 (“Communications to Customers”) to delete references to certain provisions of the Securities Act of 1933 (the “Securities Act”) that no

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<sup>1</sup> On September 29, 2008, the Commission approved the merger of The Amex Membership Corporation, Amex’s parent, with NYSE Euronext. See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-NYSE-2008-60 and SR-Amex 2008-62) (approving the Merger). As a result, Amex was renamed NYSE Alternext US LLC. For the purposes of this order, we will still refer to Amex.

<sup>2</sup> 15 U.S.C. 78s(b)(1).

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> Amendment Nos. 1 and 2 modified certain definitions in and made non-substantive corrections to proposed Rule 991.

<sup>5</sup> See Securities Exchange Act Release No. 58625 (Sept. 23, 2008), 73 FR 56869 (Sept. 30, 2008).

longer apply to standardized options<sup>6</sup> issued by registered clearing agencies and update and reorganize the rule for greater clarity. In addition, the proposal seeks to amend Amex Rule 921 (“Opening of Account”) in connection with the information member organizations must obtain from customers.

A. Rule 991 (Communications to Customers)

On December 23, 2002, the Commission published final rules that exempt standardized options issued by registered clearing agencies and traded on a registered national securities exchange or registered national securities association from the Securities Act (other than the anti-fraud provisions) and the registration requirements of the Exchange Act.<sup>7</sup> Since the Securities Act and the rules thereunder (other than the anti-fraud provisions) are no longer applicable to such standardized options, Amex proposed to remove elements of the Securities Act that are embedded in Amex Rule 991. In particular, the Exchange proposed to remove all references to a “prospectus” from Rule 991. Prospectuses are no longer required for standardized options, and The Options Clearing Corporation (“OCC”) has, in fact, ceased publication of a prospectus.<sup>8</sup> In addition, the proposed amendments would update and reorganize Rule 991. The Commission

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<sup>6</sup> “Standardized Option” is defined in Rule 19b-1 under the Exchange Act to mean options contracts trading on a registered national securities exchange, an automated quotation system of a registered national securities association, or a foreign exchange which relate to options classes the terms of which are limited to specific expiration dates and exercise prices, or such other securities as the Commission may, by order, designate.

<sup>7</sup> See “Exemption for Standardized Options From Provisions of the Securities Act of 1933 and From the Registration Requirements of the Securities Exchange Act of 1934; Final Rule,” Securities Act Release No. 8171 and Securities Exchange Act Release No. 47082 (Dec. 23, 2002), 68 FR 188 (Jan. 2, 2003).

<sup>8</sup> The options disclosure document (the “ODD”) prepared in accordance with Rule 9b-1 under the Exchange Act is not deemed to be a prospectus. 17 CFR §230.135b. See, e.g., Securities Act Release No. 8049 (Dec. 21, 2001), 67 FR 228 (Jan. 2, 2002).

has approved proposed rule amendments implementing similar rule language and format changes by the Financial Industry Regulatory Authority, Inc. and the Chicago Board Options Exchange.<sup>9</sup>

1. Deletion of Certain Provisions of Rule 991

Amex Rule 991 contains a number of references to a prospectus and other Securities Act requirements. The Exchange proposed to delete the following from Rule 991:

- Rule 991(a)(iv), which references the Securities Act prospectus definition;
- Rule 991(d), which incorporates Securities Act principles in that it prohibits written material concerning options (i.e., an offering) from being furnished to any person who has not previously or contemporaneously received the current ODD;
- Rule 991(e)(ii), which defines the term “Educational Material;”<sup>10</sup>
- Commentary .02A to Rule 991, which outlines what is permitted in an “Advertisement;”<sup>11</sup> and
- Commentary .03 to Rule 991, which concerns educational material.<sup>12</sup>

2. Re-designation of Rule 991(a) to Proposed Rule 991(d) and Related Amendments

Amex Rule 991(a) currently provides an outline of the “General Rule” for options communications. The Exchange proposed to re-designate paragraph (a) as paragraph (d), and to incorporate limitations on the use of options communications contained in current Commentary

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<sup>9</sup> See Exchange Act Release No. 58738 (Oct. 6, 2008), 73 FR 60371 (Oct. 10, 2008) (SR-FINRA-2008-13) (approval order) and Exchange Act Release No. 58823 (Oct. 21, 2008), 73 FR 63747 (Oct. 27, 2008) (SR-CBOE-2007-30) (approval order).

<sup>10</sup> This paragraph essentially incorporates language of Rule 134a under the Securities Act. While this amendment would eliminate the separate educational material category, as discussed below, the Exchange also proposed to revise the definition of Sales Literature to include educational material.

<sup>11</sup> This paragraph essentially incorporates language of Rule 134 under the Securities Act.

<sup>12</sup> See note 9, supra.

.01 to Rule 991 into proposed Rule 991(d). In addition, proposed Rule 991(d)(iii) would amend Rule 991(a)(iii) by clarifying the types of cautionary statements and caveats that are prohibited. As previously noted, the Amex proposed to delete Rule 991(a)(iv).

3. Proposed Amendments to Rule 991(b)

Amex proposed to amend Rule 991(b) to include the types of communications proposed to be added to the definition of “Options Communications” in proposed Rule 991(a). Proposed Rule 991(b)(ii) and (b)(iii) would also amend the current requirement to obtain advanced approval by a Registered Options Principal (“ROP”) for most options communications by exempting certain options communications, defined as “Correspondence” and “Institutional Sales Material.” Specifically, proposed Rule 991(b)(ii) would exempt Correspondence from the pre-approval requirement unless the Correspondence is distributed to 25 or more existing retail customers within any 30 calendar day period, and makes any financial or investment recommendation or otherwise promotes a product or service of the member. All correspondence would be subject to the supervision and review requirements of Rule 922. Proposed Rule 991(b)(iii) would exempt Institutional Sales Material from the pre-approval requirement if the material is distributed to “qualified investors” as defined in Section 3(a)(54) of the Exchange Act.<sup>13</sup>

Pre-approval by a ROP would, however, be required with respect to independently prepared reprints. In addition, proposed Rule 991(b)(iv) would require that firms retain options communications in accordance with the recordkeeping requirements of Rule 17a-4 under the

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<sup>13</sup> See 15 U.S.C. §78c(a)(54).

Exchange Act.<sup>14</sup> The proposed rule would also require that firms retain other related documents in the form and for the time periods required for options communications by Rule 17a-4.

4. Proposed Amendments to Rule 991(c)

Amex Rule 991(c) currently requires members and member organizations to obtain from the Exchange approval for every advertisement and all educational material. This requirement applies regardless of whether the options communications are used before or after delivery of a current ODD. The Exchange proposed to amend this provision to require approval by the Exchange only with respect to communications used prior to the delivery of a current ODD. The Exchange's pre-approval requirement for options communications used subsequent to the delivery of the ODD would be eliminated because the ODD should help alert the customer to the characteristics and risks associated with trading in options and because Rule 991(b) requires the ROP of a member organization to pre-approve options communications, subject to exceptions for "Correspondence" and "Institutional Sales Material." Rule 991(c) would also be amended to include the types of communications added to the definition of "Options Communications" in proposed Rule 991(a).

5. Re-designation of Rule 991(e) as Proposed Rule 991(a) and Related Amendments

Rule 991(e) currently defines the terms used in Rule 991. Amex proposed to re-designate paragraph (e) as paragraph (a). The Exchange also proposed to amend the definition of "Options Communications" in proposed Rule 991(a) to expand the types of communications governed by Rule 991 to include independently prepared reprints and other communications between a

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<sup>14</sup> 17 CFR §240.17a-4. More specifically, Rule 17a-4(b)(4) requires that a broker-dealer retain "originals of all communications received and copies of all communications sent ... including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public."

member or member organization and a customer. The Exchange proposed to amend the definitions of “Advertisement” and “Sales Literature;” and define “Correspondence,” “Institutional Sales Material,” “Public Appearances” and “Independently Prepared Reprints” to clarify the rule. In addition, as previously noted, Amex proposed to delete the definition of “Educational Material.”

6. Proposed Rule 991(e)

Proposed Rule 991(e) would set forth (i) standards for options communications that are not preceded or accompanied by an ODD and (ii) standards for options communications used prior to delivery of an ODD. These requirements generally clarify and restate the requirements contained in current Commentary .02 to Rule 991.

7. Related Commentaries

Proposed Rule 991(e)(i)(B) would require options communications to contain contact information for obtaining a copy of the ODD. Proposed Commentary .01 to Rule 991 would include the provisions found in current Commentary .02A to Rule 991 regarding how this requirement may be satisfied. In addition, as noted above, the provisions of current Commentary .01 to Rule 991 regarding limitations on the use of options communications would be incorporated into proposed Rule 991(d).

As previously noted, the provisions of current Commentary .02 to Rule 991 that outline what is permitted in an advertisement would be deleted, and the provisions relating to standards for options communications used prior to delivery of the ODD would be incorporated into proposed Rule 991(e)(ii).

Current Commentary .03 to Rule 991 regarding educational materials also would be deleted, as noted above.

Current Commentary .04 to Rule 991 sets forth the standards applicable to Sales Literature. Current Commentary .04A sets forth the requirement that Sales Literature shall state that supporting documentation for any claims, comparisons, recommendations, statistics or other technical data will be supplied upon request. The Exchange proposed to re-designate current Commentary .04A as proposed Rule 991(d)(vii).

Current Commentary .04B to Rule 991 relates to standards for Sales Literature that contain projected performance figures. Current Commentary .04C relates to standards for Sales Literature that contains historical performance figures. The Exchange proposed to re-designate current Commentary .04B as proposed Commentary .02 to Rule 991 and current Commentary .04C as proposed Commentary .03 to Rule 991.

Rule 991 currently requires that a copy of the ODD precede or accompany options related sales literature. The Exchange proposed to modify the ODD delivery requirement applicable to sales literature to provide that an ODD must precede or accompany any communication that conveys past or projected performance figures involving options or constitutes a recommendation pertaining to options.<sup>15</sup>

A notice providing the name and address of a person from whom the ODD may be obtained would be required in sales literature that does not contain a recommendation of past or projected performance figures. Because Amex is proposing to merge educational material into the sales literature category,<sup>16</sup> this amendment would continue to allow communications that are educational in nature to be disseminated without being preceded or accompanied by a copy of the ODD.

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<sup>15</sup> See proposed Rule 991(e)(i)(C) and proposed Commentaries .02 and .03 to Rule 991.

<sup>16</sup> See proposed Rule 991(a)(ii).

The Exchange proposed to re-designate current Commentary .04D to Rule 991 as proposed Commentary .04 to Rule 991. The Exchange proposed to delete current Commentaries .04E, F and G to Rule 991. The Exchange believes Commentaries .04E and F are unnecessary because worksheets are included in the definition of Sales Literature. In addition, the Exchange believes Commentary .04G is no longer necessary because the Exchange is proposing to clarify the recordkeeping requirements applicable to options communications in proposed Rule 991(b)(iv).

B. Rule 921 (Opening of Accounts)

The proposal would also amend Rule 921 in connection with the opening of options accounts. Currently, Commentary .01 to Rule 921 requires a member organization to obtain certain information about its options customers in order to comply with the due diligence requirement in opening a new account under Rule 921(c). In order to conform to the requirements of Rule 17a-3(a)(17) under the Exchange Act, the proposed amendments would require that in addition to all the essential information to determine suitability, a member organization must also obtain the customer's name, Tax Identification Number, address, and telephone number.

II. Comments

As noted above, the Commission received no comments on the proposed rule change.

### III. Discussion and Findings

After careful review of the proposed rule change, the Commission finds that the proposed rule change is consistent with Section 6 of the Act,<sup>17</sup> in general, and furthers the objectives of Section 6(b)(5),<sup>18</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and to foster cooperation and coordination with persons engaged in facilitating transactions in securities. The Commission also finds that, consistent with Section 6(b)(5) of the Act,<sup>19</sup> the proposed rule change is designed to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest, by providing the investing public with options communications rules that are designed to provide appropriate safeguards and greater clarity by promoting harmonization between the Amex and other SRO options communications rules and conforming Rule 921 to the requirements of Rule 17a-3(a)(17) under the Exchange Act.<sup>20</sup> The Commission believes that the proposal is consistent with Section 6(b)(5) of the Act<sup>21</sup> because the proposed amendments to Amex Rule 991 reflect amendments to the Securities Act that generally exempt standardized options, and will update and reorganize the Rule.

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<sup>17</sup> 15 U.S.C. 78f(b). In approving this proposal, the Commission has considered the impact of the proposed rule change on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

<sup>18</sup> 15 U.S.C. 78f(b)(5).

<sup>19</sup> Id.

<sup>20</sup> 17 CFR 240.17a-3(a)(17).

<sup>21</sup> 15 U.S.C. 78f(b)(5).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change (SR-Amex-2008-51), as modified by Amendment Nos. 1 and 2, be, and hereby is, approved.<sup>22</sup>

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

Florence E. Harmon  
Acting Secretary

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<sup>22</sup> 15 U.S.C. 78s(b)(2).

<sup>23</sup> 17 CFR 200.30-3(a)(12).