

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52563; File No. SR-Amex-2004-74)

October 4, 2005

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Elimination of Commentary .01(5) to Amex Rule 916

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 27, 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, II, and III below, which Items have been prepared by Amex. On September 26, 2005, Amex filed Amendment No. 1 to the proposed rule change.³ 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 Exchange proposes to eliminate Commentary .01(5) to Exchange Rule 916, which governs the withdrawal of approval for securities underlying options traded on the Exchange and amend Exchange Rule 915(a), which governs the criteria of underlying securities with respect to which option contracts are approved for listing and trading on the Exchange. The text of the proposed rule change is available on Amex’s web site (www.amex.com), at the Office of the Secretary of Amex, and at the Commission’s Public Reference Room.

¹ 15 U.S.C 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, Amex proposed to amend the rule text of Amex Rule 915, in order to substitute the term “NMS stock” for the term “national market system security,” for consistency with Regulation NMS. See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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 IV below. 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 purpose of the proposed rule change is to eliminate Commentary .01(5) to Amex Rule 916. Commentary .01 sets forth the guidelines to be considered by the Exchange in determining whether an underlying security previously approved for options trading continues to be appropriate. Specifically, Rule 916 and related Commentary .01 provide that if an underlying security previously approved by the Exchange does not meet the then current requirements for continuance, the Exchange will not open for trading additional series of such options class and may also limit any new opening transactions in those options series that have previously been opened for trading.

Commentary .01(5), in particular, provides that an underlying security will not be deemed to meet the Exchange’s requirements for continued approval whenever:

“5. The issuer has failed to make timely reports as required by applicable requirements of the Securities Exchange Act of 1934, and such failure has not been corrected within 30 days after the date the report was due to be filed.”

The Exchange proposes to eliminate this provision based on its experience in recent years applying this requirement. The Exchange believes that this provision limits the ability of

investors to use options to hedge existing equity positions and is not necessary given the entire application of Commentary .01. In addition, the Exchange notes that the underlying security will continue to trade on national securities exchanges, regardless of the late filings or reports required by the Exchange Act.

The Exchange submits that Commentary .01(5) potentially harms investors and the marketplace by preventing the use of new options series to hedge positions in the underlying security of companies that fail to make timely reports required by the Exchange Act. The Exchange states that this restriction is inconsistent with the underlying equity markets, whereby failure to properly file Exchange Act reports does not result in a similar trading restriction. Accordingly, the Exchange maintains that Commentary .01(5) limits the ability of investors who may wish to hedge their underlying stock positions with new options series, at a time when the ability to hedge may be particularly important.

The Exchange believes that Commentary .01(5) has substantially outlived any usefulness and now serves to unnecessarily burden and confuse the investing public. Commentary .01(5) to Rule 916 has been a part of the Exchange's continued listing criteria since late 1976, shortly after the listing and trading of standardized options commenced on the Exchange. In contrast to 1976, the Exchange states that the standardized options market today is a mature market largely consisting of sophisticated investors with significant access to information, such as information on the failure of a company to make timely Exchange Act reports. Therefore, the Exchange contends that there is no reason to limit the opportunity for investors to execute transactions in options classes (including new series within those classes) simply because a company is not timely in filing its Exchange Act reports, when investors are not similarly restricted from purchasing or selling shares in the underlying company.

Moreover, the limitation on new options series imposed pursuant to Commentary .01(5) causes considerable confusion and frustration in the options marketplace because it only restricts the trading of new series in a given option class. The Exchange has found that Commentary .01(5) tends to confuse both public customers and market professionals, who find themselves restricted from trading any new options series in a given class at the same time that trading occurs in pre-existing options series or the underlying stock itself. Still further confusion can arise in this process because the Exchange maintains that Amex, as well as the other options exchanges, have no independent means to verify whether any of the listed securities underlying options traded at the Exchange have failed to meet their Exchange Act reporting requirements. Accordingly, the options exchanges, including Amex, must rely on other SROs or third parties for such notification, which is always difficult to monitor, particularly since such third-party reports are sometimes delayed or inaccurate.⁴

The Exchange further submits that Commentary .01(5) is unnecessary for the protection of investors and the marketplace. For example, underlying securities that are delisted or fail to

⁴ The Exchange notes that it has a procedure in place to monitor when an underlying security previously approved for option transaction ceases to trade on or is delisted from its primary listed market. The Exchange's Listing Qualification Department ("Department") monitors: (1) the daily list services issued by the primary listing markets (such as the New York Stock Exchange, Inc., Amex, and The Nasdaq Stock Market); (2) press releases issued by the primary listing markets and the news wires; and (3) information circulars issued by the primary listing markets. If the Department is aware that an underlying security may be halted for trading on or delisted from its primary listed market, the Department would monitor such security closely on a daily basis. In the event of a delisting of the underlying security from its primary listed market, Amex will cease opening new series of options in such security and allow the existing series of options to expire. Additionally, if the underlying security has been halted or suspended in the primary market, the Exchange may halt trading in the option class pursuant to Amex Rule 918(b) and shall halt trading pursuant to Amex Rule 117. Telephone conversation between Jeffrey Burns, Associate General Counsel, Amex, and Steve L. Kuan, Special Counsel, Division of Market Regulation, Commission, September 29, 2005.

be NMS securities are no longer approved for options trading under existing rules. Specifically, existing Commentary .01(6) to Rule 916 provides that an underlying security will no longer be approved for options transactions when:

“(6) The issue, in the case of an underlying security that is principally traded on a national securities exchange, is delisted from trading on that exchange and neither meets NMS criteria nor traded through the facilities of national securities association, or the issue, in the case of an underlying security that is principally traded through the facilities of a national securities association, is no longer designated as an NMS security.”⁵

Amex believes a better approach is to limit or suspend options trading when the underlying security itself has been delisted and not subject the process to the inherent uncertainty of a failure of the underlying company to timely file its Exchange Act reports. The Exchange accordingly submits that Commentary .01(5) should be eliminated.

Moreover, the Exchange is amending Amex Rule 915(a) to substitute “NMS stock” as defined in Regulation NMS for the previous description of a national market system security. In addition, the Exchange is updating Commentary .01(6) of Rule 916 in light of Regulation NMS.

Both of these provisions include a requirement that the underlying security must be a national market system security (“NMS security”). As part of the recently adopted Regulation NMS, among other things, the Commission revised the definition of an “NMS security.”⁶ Specifically, Rule 600(b)(46) under Regulation NMS defines an NMS security as “any security or class of securities for which transaction reports are collected, processed, and made available

⁵ In Amendment No. 1, the Exchange proposed to amend Amex Rule 916, Commentary .01(6) to update the rule text with respect to the definition of “NMS stock” in Regulation NMS under the Act. Telephone conversation between Jeffrey Burns, Associate General Counsel, Amex, and Steve L. Kuan, Special Counsel, Division of Market Regulation, Commission, September 29, 20005.

⁶ See supra note 3.

pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.” Rule 600(b)(47) also defines an “NMS stock” as any NMS security other than an option. As such, Exchange Rule 915(a) and Commentary .01(6) of Exchange Rule 916 will be amended to reflect these new terms.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁸ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of change, 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

⁷ 15 U.S.C. 78f.

⁸ 15 U.S.C. 78f(b)(5).

the self-regulatory organization 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. 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. Please include File Number SR-Amex-2004-74 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-Amex-2004-74. 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 Room. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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-2004-74 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.⁹

Jonathan G. Katz
Secretary

⁹ 17 CFR 200.30-3(a)(12).