

error or neglect has failed to execute an order may, with the consent of the customer, take or supply for the account of the member or member organization the securities named in the order.]

#### Filling Customer's Order

(2) A member or member organization may take or supply the securities for the purpose of filling a customer's order only if:

(i) In connection with taking the securities named in a sell order, the member or member organization shall have offered the securities in the open market at a price which is higher than the bid of such member or member organization by the minimum fraction of trading permitted in such securities;

(ii) In connection with supplying the securities named in a buy order, the member or member organization shall have bid for the securities in the open market at a price which is lower than the offer of such member or member organization by the minimum fraction of trading permitted in such securities;

(iii) The price in each case is justified by the condition of the market;

(iv) In the case of an order received from a non-member customer of the member or member organization, the member or member organization either (A) prior to effecting the transaction shall have obtained from the customer the customer's consent or, except as otherwise provided by law, (B) as promptly as possible following execution of the order shall have disclosed to the customer that the securities have been taken or supplied for an account in which the member, member organization, or any member, officer or approved person therein has an interest, and the customer accepts the trade;

(v) In the case of an order received from another member or member organization, the member or member organization receiving the order, promptly after effecting the transaction notifies such other member or member organization that the member or member organization receiving the order took or supplied the securities named in the order for the account of the member, member organization or a member, officer or approved person therein and such other member or member organization accepts the trade; and

(vi) Such transaction is made in accordance with any other applicable rules of the Exchange.

(b) In the event that a member or member organization having executed a sell or buy order accepted for execution as a broker finds that inadvertently the securities sold or purchased in such execution were taken or supplied for an

account in which the member, member organization or any member, officer or approved person therein has a direct or indirect interest, such member or member organization shall report that fact to his or its principal who may accept or reject the trade.

(c) A specialist acting as principal in the course of his specializing function is prohibited from charging a commission for the execution of an order entrusted to him, as agent, by a member.

#### Commentary

01. When in the ordinary course of business, priority of bids and offers has established the market in a security and the specialist in the security has publicized the full size of his bids and offers, the provisions of clauses (i) and (ii) of Rule 152(a)(2) do not apply to his transactions as principal in the proper performance of his function to assist in the maintenance of a fair and orderly market and he may as principal take or supply the securities named in an order on his book provided he complies with the other requirements of Rule 152.

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### 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 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

Amex Rule 152 currently provides that a member that has failed to execute an order may, with the consent of the customer, take or supply for the account of the member or member organization, the securities named in the order. The Exchange believes that the current rule does not clearly state that the member may be compelled to take or supply the security in issue. The Exchange also believes that the rule is unclear whether "customer" refers to the ultimate buyer or seller or whether it refers to the person that placed the order with the member. To eliminate possible ambiguity, the Exchange is proposing to amend Amex Rule 152 to provide that

a member that fails to execute an order may be compelled to take or supply the securities named in the order.<sup>3</sup> The Exchange believes that this rewording protects the order by clearly stating that a member may be compelled to take or supply the securities in issue if the member fails to execute an order.

##### 2. Statutory Basis

The proposed rule change is consistent with section 6(b) of the Act<sup>4</sup> in general, and furthers the objectives of section 6(b)(5) of the Act<sup>5</sup> 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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.

#### 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 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

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

<sup>3</sup> The Exchange notes that the consent provisions in Amex Rule 152(a)(2) would continue to apply to the error transactions conducted under Amex Rule 152(a)(1). Telephone conversation between William Floyd-Jones, Jr., Assistant General Counsel, Amex, and Terri Evans, Assistant Director, and Cyndi Rodriguez, Special Counsel, Division of Market Regulation, Commission, on March 4, 2003.

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

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