

fee program may be held only once every thirty days.

(ii) *Tie Votes.* If a vote conducted in accordance with this Commentary results in a tie, the status quo for the specialist and Registered Traders of the particular option class shall remain in effect. Accordingly, if the specialist and Registered Traders currently participate in the marketing fee program and a tie vote occurs, the marketing fee program will remain in effect for that specialist and Registered Traders. If the specialist and Registered Traders do not participate in the marketing fee at the time the tie vote occurs, the marketing fee will not be implemented for the specialist and Registered Traders at that time.

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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 Exchange 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 IV below. The Exchange 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

In July 2000, the Amex imposed a marketing fee of \$0.40 per contract on the transactions of specialists and Registered Options Traders ("ROT's") in individual equity options. The Exchange collected the fees and distributed the funds to the specialists, who then used the funds to pay broker-dealers for orders they directed to the Amex. In August 2001, the Exchange suspended the collection of the fee. In June 2003, the Amex re-instated an equity option marketing fee on those specialist and ROT transactions resulting from orders from customers of payment accepting firms with whom the specialist has negotiated a payment for order flow arrangement.<sup>3</sup>

In conjunction with the re-instatement of the marketing fee program, the Amex now proposes to adopt Commentary .11 to Amex Rule

958 for the purpose of establishing procedures for specialists and ROTs to determine whether to continue participation in the Exchange's marketing fee program. The Amex proposes to institute their procedures on a six-month pilot basis. In connection with the adoption of the procedures included in new Commentary .11 to Amex Rule 958, the Amex would establish a Marketing Fee Program Committee ("Committee") to determine and administer the procedures for conducting the required vote. The Committee would be comprised of the Amex's Vice Chairman, two options specialists designated by the Chairman of the Specialists' Association and two ROTs designated by the Chairman of the Options Market Maker Association.

The proposed new Commentary .11 to Amex Rule 958 would identify which ROTs are eligible to vote for particular option classes. In connection with a required vote, the specialist and each eligible ROT would be entitled to one vote. Any decision to discontinue participation in the Amex's marketing fee program would be on a specialist-by-specialist basis, unless more than one specialist trades a single option class, in which case, the determination would be made on an option-class basis.<sup>4</sup> ROTs may choose to trade one or all of the option classes traded by a specialist.

The proposed voting procedures provide that a ROT would be eligible to vote on continued participation in the marketing fee program with respect to the option classes traded by an individual specialist provided that the ROT has at least 80% of its registered trader activity in each of the three immediately preceding calendar months (measured in terms of both contract volume and transactions) in one or more of the options traded by that specialist.<sup>5</sup> When one specialist trades a single option class or multiple specialists trade a single option class, ROTs would need to have at least 80% of their registered trader activity in each of the three immediately preceding calendar months (measured in terms of both contract volume and transactions) in that option class to be eligible to vote on whether to continue with the marketing fee program. In addition, the ROT would

<sup>4</sup> The Amex notes that most specialists trade two or more option classes, some specialists trade only one active option class, and some actively traded option classes have two or more specialists.

<sup>5</sup> The Amex notes that this 80% trading activity requirement pertains to the trading activity of an individual ROT, and not to the aggregate trading activities of any group of ROTs. Telephone conversation between Jeffrey P. Burns, Associate General Counsel, Amex, and Ian K. Patel, Attorney, Division of Market Regulation, Commission, on September 26, 2003.

need to continue to trade the option class or classes at the time of the vote. The Exchange believes that these requirements assure that only those ROTs who have concentrated their activity in one or more option classes traded by a specialist over the last three months would be eligible to participate in the vote.

*Process to Request a Vote.* After the program has been in effect for the initial three calendar month period, the specialist or any eligible ROT could request that a vote be held by submitting a written request to the Secretary of the Exchange. The Amex would provide at least 10 calendar days' posted notice to the specialist and other ROTs of the time and date of the vote. The Exchange would verify that the member requesting a vote is an eligible ROT and would keep the identity of such individual confidential.

*Specialist and ROTs Participating in the Marketing Fee Program.* The specialist and ROTs could cease to participate in the marketing fee program after the initial three-month period has expired. In order to opt out of the marketing fee program, the following actions must occur: (i) The question must be presented for a vote of the specialist<sup>6</sup> and eligible ROTs; (ii) a majority of the eligible ROTs must participate in the vote; and (iii) a majority of the votes cast must be in favor of not continuing to participate in the marketing fee program. In the event that the vote is tied, the marketing fee program would remain in effect in those option classes for the next three consecutive months.

*Specialist and ROTs Not Participating in the Marketing Fee Program.* The proposed voting procedure set forth in Commentary .11 provides that twenty days after the specialist and eligible ROTs vote to discontinue participation in the marketing fee program, the specialist and any eligible ROT may request that another vote be held to determine whether the trading crowd should again participate in the marketing fee program.<sup>7</sup> In this case, if a majority of the votes cast are in favor of again participating in the marketing fee program, the program would be in effect in those option classes for the next three consecutive months. In the event that the vote is tied, the specialist and ROTs would be deemed to have indicated that they do not wish to

<sup>6</sup> The specialist may (but is not required to) participate in the vote.

<sup>7</sup> The Exchange notes that actual votes may only be held once every thirty days. Because there is a ten-calendar day notice period prior to a vote, however, the specialist and any eligible ROT may request a vote twenty days after the preceding vote.

<sup>3</sup> See Securities Exchange Act Release No. 48053 (June 17, 2003), 68 FR 37880 (June 25, 2003) (SR-Amex-2003-50).