SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55913; File No. SR-Amex-2007-13)

June 15, 2007

Self-Regulatory Organizations; American Stock Exchange LLC; Order Approving Proposed Rule Change as Modified by Amendment No. 1 Relating to the Codification of Exchange Policy Regarding Specialist Commissions

I. Introduction

On January 29, 2007, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to amend Amex Rule 154—AEMI and Amex Rule 154—AEMI-One to expand the scope of its rules that specify when specialists may charge commissions. The proposed rule change was published for comment in the Federal Register on April 2, 2007.[3] The Commission received three comment letters regarding the proposal.[4] On May 29, 2007, Amex filed Amendment No. 1 to the proposed rule change.[5] This order approves the proposed rule change, as modified by Amendment No. 1.

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 55533 (March 26, 2007), 72 FR 15733.

4 See letters to Nancy M. Morris, Secretary, Commission, from Samuel F. Lek, Lek Securities Corporation, dated April 26, 2007 ("Lek Letter"); from Jonathan Q. Frey, Managing Partner, J. Streicher & Co. L.L.C., Brendan E. Cryan, Brendan E. Cryan and Company, LLC, Robert B. Nunn, Cohen Specialists LLC, and Michael Marchisi, AIM Specialists, dated April 17, 2007 ("Equity Specialist Firms Letter"); and from Jerry O'Connell, Chief Regulatory Officer, Susquehanna Investment Group, to, dated February 13, 2007 ("Susquehanna Letter").

5 In Amendment No. 1, Amex removed all references to Amex Rule 154—AEMI-One in the proposed rule change because the AEMI-One rules have been replaced

II. Description

The Exchange proposes to adopt Amex Rule 154—AEMI (k) to prohibit specialists from charging a commission for orders or portions of orders that have not been executed. The proposed rule would extend the prohibitions on specialist commissions contained in Amex Rule 154(b) to Exchange-Traded Funds ("ETFs") and equities trading on the AEMI System. These restrictions prohibit specialists from (i) charging a commission on off floor orders that are electronically delivered to the specialist except in cases of orders that require special handling by the specialist or for which the specialist provides a service, and (ii) billing customers for electronically delivered orders that are executed automatically by the Exchange's order processing facilities upon receipt. In addition, proposed Rule 154—AEMI (k) would reference Rule 152—AEMI (c), which prohibits specialists from charging a commission where they act as principal in the execution of an order entrusted to them as agent. Lastly, the proposed rule sets forth the types of orders specialists would be allowed to bill a commission. These orders would include: (i) limit orders that remain on the book for more than two minutes; (ii) tick sensitive orders (e.g., an order to sell short in a security subject to the Commission's "tick-test"); (iii) stop or stop limit orders; (iv) fill-or-kill and immediate-or-cancel orders; and (v) orders for the account of a competing market maker.

III. Summary of Comments

The Commission received three comment letters regarding the proposed rule change. One comment letter, submitted by Lek Securities Corporation, supported the proposed rule change, agreeing with the Exchange's rationale for the proposed rule

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by the AEMI rules. This is a technical amendment and is not subject to notice and comment.

change.[6] In this regard, the commenter asserted that commissions on cancellations are particularly harmful to fair and orderly markets" and that cancellation fees "amount to a tax or toll on an instrumentality of the exchange."[7] This commenter also asserted that permitting a specialist "to bill for transactions that involve no work sanctions an abuse of the specialist's privileged position."[8]

Another comment letter, submitted by a group of equity specialist firms active on Amex, stated that they are not taking a position regarding the "substantive terms" of the proposed rule change but, rather, are expressing "strong disagreement with the Exchange's stated rationale" for the proposed rule change.[9] The specialist firms noted that Amex's stated rationale for the proposed rule change is that "specialist commissions weaken the Exchange's competitive position."[10] The specialist firms suggested that, rather than focusing on costs, the focus should be on whether specialists bring value in excess of their costs.[11] These specialist firms also suggested that it "might be more productive for the Amex to focus on reducing its own rather more significant costs rather than specialist commissions."[12]

The third comment letter, submitted by Susquehanna, opposed the Exchange's proposal. Susquehanna, in particular, expressed concern about the timing of the proposal, as it believed "exponential increases in order and cancel volume levels are expected with

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6 See Lek Letter at 2.

7 Id. at 2.

8 Id. at 3.

9 See Equity Specialist Firms Letter at 1.

10 Id. at 1-2.

11 Id. at 2-4.

12 Id. at 2.

the implementation of Regulation NMS."[13] Susquehanna asserted that these increased levels of volume on the Exchange could have a significant impact on the ability of specialists to fulfill their agency obligations.[14] In this regard, Susquehanna asserted that the Exchange should not eliminate the ability of specialists "to charge for providing agency functions" until the Exchange determines whether the increased order and cancel volume levels significantly effect the ability of specialists to perform their agency obligations.[15] Susquehanna also requested that "[i]f this proposal is approved . . . any specialist agency responsibility for orders and cancels on AEMI be set forth so that the respective specialist is duly advised as to such attendant obligations."[16]

IV. Discussion

The Commission has carefully reviewed the proposed rule change and the comment letters received, and the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act[17] and the rules and regulations thereunder applicable to a national securities exchange.[18] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[19] because it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in

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13 See Susquehanna Letter at 1-2.

14 Id. at 1-3.

15 Id. at 2-4.

16 Id. at 4.

17 15 U.S.C. 78f.

18 In approving this proposed rule change the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

19 15 U.S.C. 78f(b)(5).

general, to protect investors and the public interest. The Commission also believes that the proposed rule change is consistent with Section 11(A)(a)(1)(C) of the Act[20] which states that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure, among other things, economically efficient execution of securities transactions, and fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets.

The Commission notes that it previously approved a substantially similar Amex rule that prohibited specialist commissions for equities traded on the Exchange's legacy system.[21] The Exchange is now proposing to: (i) apply the prohibition on specialist commissions to equities and ETFs traded on the AEMI System; (ii) expand the prohibition on specialist commissions to market at the close orders and limit at the close order; and (iii) specify that specialist commissions can only be charged for orders that are executed and not for orders that are cancelled or expire unexecuted. One commenter, Susquehanna, expressed concern about the timing of the proposal in light of the implementation of Regulation NMS.[22] The Commission notes that Amex-traded equities

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[20] 15 U.S.C. 78k-1(a)(1)(C).

[21] See Securities Exchange Act Release No. 55008 (December 22, 2006), 72 FR 597 (January 5, 2007) (Approval of amendment to Amex Rule 154 regarding prohibition of specialist commissions for equity orders). The Commission also approved a rule prohibiting specialist commissions on options orders. See Securities Exchange Act Release No. 51235 (February 22, 2005), 70 FR 9687 (February 28, 2005) (Approval of CBOE Rule 8.85(b)(iv)). The New York Stock Exchange, Inc. ("NYSE") recently adopted a rule prohibiting specialists from charging commissions on orders in their speciality securities. See Securities Exchange Act Release No. 54850 (November 30, 2006), 71 FR 71217 (December 8, 2006) (Notice of Filing and Immediate Effectiveness of Amendments to NYSE Rule 123B and Adoption of NYSE Rule 104B).

[22] See Susquehanna Letter at 1-2.

and ETFs have been trading on the AEMI System, which the Exchange designed to comply with Regulation NMS, since February 5, 2007, a period of nearly four months. In response to Susquehanna's request that it be advised of its specialist agency responsibilities for orders and cancels on AEMI if the proposed rule change is approved,[23] the Commission notes that its approval of the proposed rule change does not change a specialist's agency responsibilities under the federal securities laws or agency law principles.

In addition, the Commission finds that the proposal is consistent with Section 6(e)(1) of the Act,[24] because it is not designed to permit unfair discrimination between customers, issuers, brokers and dealers, or to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members. Section 6(e) of the Act[25] was adopted by Congress in 1975 to statutorily prohibit the fixed minimum commission rate system. As noted on a report of the House of Representatives one of the purposes of the legislation was to "reverse the industry practice of charging fixed rates of commission for transaction on the securities exchanges."[26] The fixed minimum commission rate system allowed exchanges to set minimum commission rates that their members had to charge their customers, but allowed members to charge more. Amex's proposal, by contrast, does not establish a minimum commission rate, but instead prohibits the Exchange's specialists from charging a commission for handling an equity order that is executed on an opening or reopening or an equity order (or portion thereof)

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23 Id. at 4.

24 15 U.S.C. 78f(e)(1).

25 15 U.S.C. 78f(e).

26 H.R. Rep. No. 94-123, 94th Cong., 1st Sess. 42 (1975).

that is executed against the specialist as principal, or for the execution of an off-floor equities order delivered to the specialist through the Exchange's electronic order routing systems, subject to certain exceptions. Accordingly, the Commission does not believe that the Amex's proposal constitutes fixing commissions, allowances, discounts, or other fees for purposes of Section 6(e)(1) of the Act.[27] The Commission also notes that Amex's limits on fees that specialists may charge applies only to members who choose to be specialists on Amex. By limiting fees, the Amex is merely imposing a condition, which is consistent with the Act, on a member's appointment as a specialist.

V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Sections 6(b)(5) and 6(e)(1) of the Act.[28]

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[27] 15 U.S.C. 78f(e)(1).

[28] 15 U.S.C. 78f(b)(5) and 78f(e)(1).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[29] that the proposed rule change (SR-Amex-2007-13), as modified by Amendment No. 1, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[30]

Florence E. Harmon
Deputy Secretary

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[29] 15 U.S.C. 78s(b)(2).

[30] 17 CFR 200.30-3(a)(12).