

allocations in the Eliminated Portfolio determine that another investment is more appropriate due to the change in portfolio expenses, such Contract owners can transfer their Contract value to any of the remaining thirteen investment divisions.

### Applicants Legal Analysis And Conditions

1. Section 26(b) of the 1940 Act provides that it shall be unlawful for any depositor or trustee of a registered unit investment trust holding the security of a single issuer to substitute another security for such security unless the Commission shall have approved such substitution; and the Commission shall issue an order approving such substitution if the evidence establishes that it is consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the 1940 Act. Section 26(b) protects the expectation of investors that the unit investment trust will accumulate shares of a particular issuer and is intended to insure that unnecessary or burdensome sales loads, additional reinvestment costs or other charges will not be incurred due to unapproved substitutions of securities.

2. Applicants request an order pursuant to section 26(b) of the 1940 Act approving the Substitution. Applicants represent that the purposes, terms, and conditions of the Substitution are consistent with section 26(b). Applicants believe the Substitution will benefit the participants by eliminating a portfolio with below average historical returns which, due to its small size, is difficult to manage in compliance with applicable diversification requirements. Applicants represent that the Eliminated Portfolio, when compared to funds with similar objectives, has been performing below average and Maxim Series Fund, Inc. plans to cease offering the Eliminated Portfolio. Its one, five and since inception returns of 19.77%, 12.56%, and 10.15% respectively, have been below average compared to similar funds. GWL&A proposes to provide Contract owners with an investment in the Substituted Portfolio which has similar investment objectives to the Eliminated Portfolio. The Substitution will effectively remove a poorly performing portfolio from the Separate Account while the similarity in investment objectives provides a means for Contract owners to continue their current investment goals and risk expectations.

3. Applicants represent that the Substitution will be effected at net asset value in conformity with sections 22(c)

and 22(g) of the 1940 Act and Rule 22c-1 thereunder. The Substitution may be effected primarily for cash, but also may involve partial redemptions in-kind of securities ("Related Transactions"). The use of in-kind redemptions in conformity with section 22(g) of the 1940 Act would alleviate the impact of the brokerage fees and expenses upon GWL&A or the investment adviser or sub-adviser of the Substituted Portfolios, as these entities will bear all expenses related to the Substitution. The Related Transactions will be effected to the extent consistent with the investment objectives and any applicable diversification requirements.

4. Either GWL&A or the investment adviser of the Substituted Portfolio will assume the transfer and custodial expenses and legal and accounting fees incurred with respect to the Substitution. Participants will not incur any fees or charges as a result of the transfer of account values from any portfolio. Applicants represent that there will be no increase in the Contract or Separate Account fees and charges after the Substitution. Applicants further represent that the Substitution is designed to avoid any adverse federal tax impact to the Contract owners or participants.

5. Section 17(a)(1) of the 1940 Act prohibits any affiliated person or an affiliate of an affiliated person, of a registered investment company, from selling any security or other property to such registered investment company. Section 17(a)(2) of the 1940 Act prohibits any affiliated person as described above from purchasing any security or other property from such registered investment company.

6. Section 17(b) of the 1940 Act authorizes the Commission to issue an order exempting a proposed transaction from section 17(a) if: (a) The terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policy of each registered investment company concerned; and (c) the proposed transaction is consistent with the general purposes of the 1940 Act.

7. Applicants request an order pursuant to section 17(b) of the 1940 Act exempting the Related Transactions from the provisions of sections 17(a) of the 1940 Act.

8. Applicants represent that the terms of the Substitution are reasonable and fair and do not involve overreaching on the part of any person concerned. The Substitution will be effected at the net asset value of the securities involved and the interests of Contract owners will

not be diluted. In-kind redemptions will alleviate some of the expenses involved with the Substitution and only will be used to the extent they are consistent with the investment objectives and applicable diversification requirements of the affected portfolios. All in-kind redemptions will be conducted in a manner conforming with the conditions of Rule 17a-7 under the 1940 Act.

9. Applicants represent that the Substitution and Related Transactions are consistent with the policies of each investment company involved and the general purposes of the 1940 Act, and comply with the requirements of section 17(b).

### Conclusion

Applicants assert that, for the reasons summarized above, the requested order approving the Substitution and Related Transactions should be granted.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-38986; File No. SR-Amex-97-28]

### Self-Regulatory Organizations, Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by American Stock Exchange, Inc. Relating to the Extension of the Exchange's Pilot Program for Specialists in Portfolio Depository Receipts and Index Fund Shares To Participate in the After-Hours Trading Facility

August 27, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on August 6, 1997, the American Stock Exchange, Inc. ("Amex" or "Exchange") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to grant accelerated approval to the proposed rule change.

### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The text of the proposed rule change is available at the Office of the Secretary, the Amex and at the Commission.

### **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 self-regulatory organization 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 III below. The self-regulatory organizations 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 Exchange seeks to continue the pilot program permitting specialists in Portfolio Depositary Receipts ("PDRs"), investment trust securities and Index Fund Shares<sup>1</sup> to participate in the after-hours trading ("AHT") facility to "clean-up" order imbalances and to effect closing price coupled orders.<sup>2</sup>

The Exchange believes that extension of the Exchange's pilot program to permit specialists in PDRs, investment trust securities and Index Fund Shares to participate in the AHT facility in order to "clean-up" order imbalances

<sup>1</sup> The Exchange currently lists two Portfolio Depositary Receipts, viz., Standard and Poor's Depositary Receipts on the S&P 500 and MidCap Indexes ("SPDRs"). The Exchange currently lists 17 Index Fund Shares which are commonly referred to as WEBS<sup>sm</sup>. WEBS are shares issued by an open-end management investment company that seek to provide investment results that correspond generally to the price and yield performance of a specified foreign or domestic equity market index. The Exchange currently lists WEBS based on the following Morgan Stanley Capital International ("MSCI") indices: MSCI Australia Index; MSCI Austria Index; MSCI Belgium Index; MSCI Canada Index; MSCI France Index; MSCI Germany Index; MSCI Hong Kong Index; MSCI Italy Index; MSCI Japan Index; MSCI Malaysia Index; MSCI Mexico Index; MSCI Netherlands Index; NSCI Singapore (Free) Index; MSCI Spain Index; MSCI Sweden Index; MSCI Switzerland Index; and MSCI United Kingdom Index (See SR-AMEX-95-43).

<sup>2</sup> According to the Exchange, there was very limited trading volume in the AHT for SPDRs, investment trust securities and Index Fund Shares during August 1, 1996 to May 30, 1997. The Exchange, nevertheless, is optimistic that there could be increased after hours trading activity in these securities given their increasing popularity.

and effect closing price coupled orders would benefit investors by providing additional liquidity to the listed cash market for derivative securities based upon well known market indexes. The market price of these securities is based upon transactions largely effected in markets other than the Amex. (In the case of Index Fund Shares, the market price of these securities is based exclusively on transactions occurring outside the Amex.) The specialist in the Amex listed derivatives has no unique access to market sensitive information regarding the market for the underlying securities or closing index values. The Exchange, therefore, believes that specialist participation in the AHT facility in PDRs, investment trust securities and Index Fund Shares in the manner previously approved by the Commission does not raise any market integrity issues. In addition, should a customer not care for an execution at the closing price, the rules of the Exchange's AHT facility permit cancellation of an order up to the close of the AHT session at 5 p.m. (Order in the AHT facility are not executed until the 5 p.m. close of the After-Hours session.) A customer, therefore, has approximately 40 minutes to determine if an execution at the closing price suits its needs, and may cancel its order if it believes that the closing price does not suit its objectives.

##### (2) Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b) in particular in that it is designed to prevent fraudulent manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

Amex does not believe the proposed extension of the pilot program 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. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing.

Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. 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, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. All submissions should refer to File No. SR-Amex-97-28 and should be submitted by September 25, 1997.

### **IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change**

The Commission has carefully reviewed PCX's proposed rule change and believes, for the reasons set forth below, the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, the requirements of Sections 6(b)(5) in that it is designed to prevent fraudulent, manipulative acts and practices and to promote just and equitable principles of trade, and to remove impediments to and protect the mechanism of a free and open market and to protect investors and the public interest.<sup>3</sup>

Under the pilot program, specialists in PDRs, investment trust securities, and Index Fund Shares may participate in the AHT facility to clean up order imbalances by entering an order for their own account. The pilot program also allows specialists in PDRs, investment trust securities, and Index Fund Shares to participate in a coupled closing price order as long as the other side of the order is not for an account in which a member or member organization has a direct or indirect interest. Moreover, the pilot program eliminates the mitigation of limit orders for PDRs, investment trust securities and Index Fund Shares from the specialists' limit order book to the AHT

<sup>3</sup> In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

facility to prevent the potential for manipulation or misuse of specialists' information regarding which limit orders are eligible for execution in the AHT facility.

In the original approval order, the Commission observed that the pilot program should assist specialists in their obligation to minimize temporary disparity between supply and demand. Moreover, the Commission agreed with the Exchange that the pilot program should benefit investors by providing additional liquidity to the listed cash market for derivative securities based upon well-known market indexes. The Commission also noted that the proposed rule change struck a reasonable balance between the Exchange's need to accommodate the needs of investors by providing additional liquidity to the listed cash market for derivative securities based on market indexes, and the need to prevent the potential for manipulation or misuses of information.

The Commission initially approved the pilot program for one year. The pilot program has been extended several times to allow the Exchange and the Commission to evaluate further whether there were additional issues that needed to be addressed. At the Commission's request, the Exchange submitted a report with this rule filing describing the Exchange's experience with the pilot program. According to the report, there was very limited trading volume in the AHT for SPDRs, investment trust securities and Index Fund Shares during August 1, 1996 to May 30, 1997. Given the experience Amex has gained through extended operation and renewal of the pilot program, the Commission expects the Amex to determine, at least two months prior to expiration of the current pilot, whether to seek permanent approval of, or discontinue, the pilot. Should the Exchange decide to seek permanent approval of the pilot program, it should submit another report to the Commission by May 1, 1998, describing its experiences with the pilot program.

The Commission believes that there is good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. This will permit the pilot program to continue on an uninterrupted basis for another year, until August 29, 1998. The Exchange proposes to continue using the identical procedures contained in the pilot program as originally approved. In addition, the rule change that implemented the pilot program was published in the **Federal Register** for the full comment period and no

comments were received. Accordingly, the Commission believes that it is consistent with Sections 6 and 19(b) of the Act<sup>4</sup> to accelerate approval of the proposal rule change.

*It is therefore, ordered*, pursuant to Section 19(b)(2) of the Act,<sup>5</sup> that the proposed rule change (SR-Amex-97-28) is hereby approved on an accelerated basis.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>6</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-38985; File No. SR-NASD-97-53]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Trading in Exchange-Listed Securities in the Third Market

August 27, 1997.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on July 28, 1997, the National Association of Securities Dealers, Inc. ("NASD"), through its wholly-owned subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD is proposing to amend several rules governing the trading in exchange-listed securities in the over-the-counter market. Specifically, the NASD is proposing to amend rules of the NASD to: (1) Codify permissible uses of computer-generated quote systems with respect to exchange-listed securities; (2) eliminate the excess spread rule for market makers in exchange-listed securities; (3) reduce the minimum quotation size applicable

to market makers in exchange-listed securities to one unit of trading (*i.e.*, 100 shares), regardless of whether the CQS market maker<sup>2</sup> is displaying a customer's limit order or quoting for its own proprietary account; (4) extend exemptive provisions of the NASD's limit order protection rule applicable to Nasdaq-listed securities (the "Manning Rule") to exchange-listed securities; and (5) reduce from 1000 to 100 the number of shares that the Computer Assisted Execution System ("CAES") will execute automatically. Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

#### 6330. Obligations of CQS Market Makers

(a) No Change.  
(b) [CQS market makers shall be required to input a minimum quotation size of 200 or 500 shares in each reported security (as established and published from time to time by the Association) depending on trading characteristics of the security; provided that a CQS market maker may input a quotation size less than such minimum quotation size to display a limit order in compliance with SEC Rule 11Ac1-4. A limit order displayed in a] A CQS market maker's quotation [pursuant to SEC Rule 11Ac1-4] must be for at least one normal unit of trading [or a multiple thereof].

[(c) Excess Spreads.  
A market maker shall not enter quotations in CQS securities that exceed the parameters for maximum allowable spreads as approved by the Association's Board of Governors and that may be published from time to time by the Association. The maximum allowable spreads for CQS securities shall be 125 percent of the average of the three (3) narrowest market maker spreads in each security, which average spread calculations shall include quotations from national securities exchanges (if the number of CQS market makers in a security plus the number of national securities exchanges trading that security is less than three (3), the maximum allowable spread will be 125 percent of the average spread); provided, however, that the maximum allowable spread shall never be less than 1/4 of a point.]

(d) redesignated as paragraph (c)  
(d) *Computer-Generated Quotations.*  
(1) *General Prohibition—Except as provided below, this rule prohibits the*

<sup>4</sup> 15 U.S.C. 78f and 78s(b)(2).

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> Quotations and quotation sizes in reported securities may be entered into the Consolidated Quotations Service (CQS) through The Nasdaq Stock Market only by an Association member registered with it as a CQS market maker. See NASD rule 6320.