



SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

**Form 19b-4 Information**

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change**

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

**1. Text of the Proposed Rule Changes**

(a) The American Stock Exchange LLC (the “Amex” or the “Exchange”) proposes to amend Rule 991 (“Communications to Customers”) to delete reference to certain provisions of the Securities Act of 1933 (the “1933 Act”) that no longer apply to standardized options<sup>1</sup> issued by registered clearing agencies and update and reorganize the Rule for greater clarity. In addition, the proposal also seeks to amend Rule 921 (“Opening of Account”) in connection with the documentary material member organizations must obtain from customers. The text of the proposed rule change is attached as Exhibit 5.

**2. Procedures of the Self-Regulatory Organization**

The proposed rule change was approved by the Exchange’s Board of Governors on May 25, 2006. No further action by the Board or by the membership of the Exchange is required to be taken.

**3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory basis for, the Proposed Rule Change**

(a) *Purpose*

On December 23, 2002, the Securities and Exchange Commission (the “Commission” or “SEC”) published final rules that exempt standardized options issued by registered clearing agencies and traded on a registered national securities exchange or registered national securities association from the 1933 Act (other than the anti-fraud

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<sup>1</sup> “Standardized option” is defined in Rule 19b-1 under the Securities Exchange Act of 1934 (the “1934 Act”) to mean options contracts trading on a registered national securities exchange, an automated quotation system of a registered national securities association, or a foreign exchange which relate to options classes the terms of which are limited to specific expiration dates and exercise prices, or such other securities as the Commission may, by order, designate.

provisions) and the registration requirements of the 1934 Act.<sup>2</sup> Since the 1933 Act and the rules thereunder are no longer applicable to standardized options, the Amex proposes to remove elements of the 1933 Act that are embedded in Amex Rule 991. In particular, the Exchange proposes to remove all references to a “prospectus” from Rule 991. There is no longer a need for a prospectus or any references thereto, and The Options Clearing Corporation (“OCC”) has, in fact, ceased publication of a prospectus.<sup>3</sup> In addition, the amendments proposed will update and reorganize Rule 991. For uniformity, the Financial Industry Regulatory Authority, Inc. (“FINRA”), the New York Stock Exchange (“NYSE”) and the Chicago Board Options Exchange, Inc. (“CBOE”) have all filed rule amendments with the Commission to implement similar rule language and format changes.<sup>4</sup>

### **Deletion of Certain Provisions of Rule 991**

Amex Rule 991 contains a number of references to a prospectus and other 1933 Act requirements. The Exchange proposes to delete the following from Rule 991:

- Rule 991(a)(iv), which references the 1933 Act prospectus definition;
- Rule 991(d), which embodies 1933 Act principles in that it prohibits written material concerning options (i.e., an offering) from being furnished to any person who has not previously or contemporaneously received the current ODD (an alternative to a prospectus);
- Rule 991(e)(ii), which defines the term “educational material”;<sup>5</sup>
- Commentary .02A to Rule 991, which outlines what is permitted in an

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<sup>2</sup> See “Exemption for Standardized Options From Provisions of the Securities Act of 1933 and From the Registration Requirements of the Securities Exchange Act of 1934; Final Rule”, Securities Act Release No. 8171 and Securities Exchange Act Release No. 47082 (December 23, 2002), 68 FR 188 (January 2, 2003).

<sup>3</sup> The options disclosure document (the “ODD”) prepared in accordance with Rule 9b-1 under the 1934 Act is not deemed to be a prospectus. 17 CFR §230.135b. *See e.g.* Securities Act Release No. 8049 (December 21, 2001), 67 FR 228 (January 2, 2002).

<sup>4</sup> See SR-FINRA-2008-13, SR-CBOE-2007-30 and SR-NYSE-2006-50.

<sup>5</sup> This paragraph essentially incorporates language of Rule 134a under the 1933 Act. While this amendment would eliminate the separate educational material category, as discussed below, the Exchange also proposes to revise the definition of Sales Literature to include educational material.

“advertisement”,<sup>6</sup> and

- Commentary .03 to Rule 991, which concerns educational material.<sup>7</sup>

### **Re-designation of Rule 991(a) to Proposed Rule 991(d) and Related Amendments**

Amex Rule 991(a) currently provides an outline of the “General Rule” for options communications. The Exchange proposes to re-designate paragraph (a) as paragraph (d), and to incorporate limitation on the use of options communications contained in current Commentary .01 to Rule 991 into proposed Rule 991(d). In addition, proposed Rule 991(d)(iii) would amend Rule 991(a)(iii) by clarifying the types of cautionary statements and caveats that are prohibited. As previously noted, the Amex proposed to delete Rule 991(a)(iv).

### **Proposed Amendments to Rule 991(b)**

Amex proposes to amend Rule 991(b) to include the types of communications proposed to be added to the definition of “Options Communications” in proposed Rule 991(a). Proposed Rule 991(b)(ii) and (b)(iii) would also amend the current requirements to obtain advanced approval by a Registered Options Principal (“ROP”) for most options communications by exempting certain options communications, defined as “Correspondence” and “Institutional Sales Material. Specifically, proposed Rule 991(b)(ii) would exempt Correspondence from the pre-approval requirement unless the Correspondence is distributed to 25 or more existing retail customers within any 30 calendar day period and make any financial or investment recommendation or otherwise promotes a product or service of the member. Proposed Rule 991(b)(iii) would exempt Institutional Sales Material from the pre-approval

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<sup>6</sup> This paragraph essentially incorporates language of Rule 134 under the 1933 Act.

<sup>7</sup> See *supra* note 5.

requirement if the material is distributed to “qualified investors” as defined in Section 3(a)(54) of the 1934 Act.<sup>8</sup>

Pre-approval by a ROP would, however, be required with respect to independently prepared reprints. In addition, proposed Rule 991(b)(iv) would require that firms retain options communications in accordance with the recordkeeping requirements of Rule 17a-4 under the 1934 Act.<sup>9</sup> The proposed rule would also require firms retain other related documents in the form and for the time periods required for options communications by Rule 17a-4.

### **Proposed Amendments to Rule 991(c)**

Rule 991(c) currently requires members and member organizations to obtain approval for every advertisement and all educational material from the Exchange. This requirement applies regardless of whether the options communications are used before or after delivery of a current ODD. The Exchange proposes to amend this provision to require approval by the Exchange only with respect to communications used prior to the delivery of a current ODD. The Exchange’s pre-approval requirement of options communications used subsequent to the delivery of the ODD is being eliminated because the ODD should help alert the customer to the characteristics and risks associated with trading in options and because Rule 991(b) requires the ROP of a member organization to pre-approve options communications subject to exceptions for “Correspondence” and “Institutional Sales Material.” Rule 991(c) would also be

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<sup>8</sup> See 15 U.S.C. §78c(a)(54).

<sup>9</sup> 17 CFR §240.17a-4. More specifically, Rule 17a-4(b)(4) requires that a broker-dealer retain “originals of all communications received and copies of all communications sent .....including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public.”

amended to include the types of communications added to the definition of “Options Communications” in proposed Rule 991(a).

### **Re-designation of Rule 991(e) to Proposed Rule 991(a) and Related Amendments**

Rule 991(e) currently defines the terms used in Rule 991. The Amex proposes to re-designate paragraph (e) as paragraph (a). The Exchange also proposes to amend the definition of “Options Communications” in proposed Rule 991(a) to expand the types of communications governed by Rule 991 to include independently prepared reprints and other communications between a member or member organization and a customer. The Exchange proposed to amend the definitions of “Advertisement” and “Sales Literature;” and define “Correspondence,” “Institutional Sales Material,” “Public Appearances” and “Independently Prepared Reprints” to clarify the Rule. In addition, as previously noted, Amex proposes to delete the definition of “Educational Material.”

### **Proposed Rule 991(e)**

Proposed Rule 991(e) would set forth (i) standards for options communications that are not preceded or accompanied by an ODD and (ii) standards for options communications used prior to delivery of an ODD. These requirements generally clarify and restate the requirements contained in current Commentary .02 to Rule 991.

### **Related Commentaries**

Proposed Rule 991(e)(i)(B) requires options communications to contain contact information for obtaining a copy of the ODD. Proposed Commentary .01 to Rule 991 would include the provisions found in current Commentary .02A to Rule 991 regarding how this requirement may be satisfied. In addition, as noted above, the

provisions of current Commentary .01 to Rule 991 regarding limitations on the use of options communications are proposed to be incorporated into proposed Rule 991(d).

As previously noted, the provisions of current Commentary .02 to Rule 991 outline what is permitted in an advertisement, are proposed to be deleted and the provisions relating to standards for options communications used prior to delivery of the ODD are proposed to be incorporated into proposed Rule 991(e)(ii).

Current Commentary .03 to Rule 991 regarding educational materials is proposed to be deleted as noted above.

Current Commentary .04 to Rule 991 sets forth the standards applicable to Sales Literature. Current Commentary .04A sets forth the requirement that Sales Literature shall state that supporting documentation for any claims, comparisons, recommendations, statistics or other technical data, will be supplied upon request. The Exchange proposes to re-designate current Commentary .04A as proposed Rule 991(d)(vii).

Current Commentary .04B to Rule 991 relates to standards for Sales Literature that contain projected performance figures. Current Commentary .04C relates to standards for Sales Literature that contains historical performance figures. The Exchange proposes to re-designate current Commentary .04B as proposed Commentary .02 to Rule 991 and current Commentary .04C as proposed Commentary .03 to Rule 991.

Rule 991 currently requires that a copy of the ODD precede or accompany options related sales literature. The Exchange proposes to modify the ODD delivery requirement applicable to sales literature to provide that an ODD must precede or

accompany any communication that conveys past or projected performance figures involving options or constitutes a recommendation pertaining to options.<sup>10</sup>

A notice providing the name and address of a person from whom the ODD may be obtained would be required in sales literature that does not contain a recommendation of past or projected performance figures. Because Amex is proposing to merge educational material into the sales literature category,<sup>11</sup> this amendment would continue to allow communications that are educational in nature to be disseminated without being preceded or accompanied by a copy of the ODD.

The Exchange proposes to re-designate current Commentary .04D to Rule 991 as proposed Commentary .04 to Rule 991. The Exchange proposes to delete current Commentaries .04E, F and G to Rule 991. The Exchange believes Commentaries .04E and F are unnecessary because worksheets are included in the definition of Sales Literature. In addition, the Exchange believes Commentary .04G is no longer necessary because the Exchange is proposing to clarify the recordkeeping requirements applicable to options communications in proposed Rule 991(b)(iv).

The proposal further seeks to amend Rule 921 in connection with the opening of options accounts. Currently, Commentary .01 to Rule 921 requires a member organization to obtain certain information about their options customers in order to comply with the due diligence requirement in opening a new account under Rule 921(c). In order to conform to the requirements of Rule 17a-3(a)(17) under the 1934 Act, the proposed amendments would require that in addition to all the essential information to

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<sup>10</sup> See proposed Rule 991(e)(i)(C) and proposed Commentaries .02 and .03 to Rule 991.

<sup>11</sup> See proposed Rule 991(a)(ii).

determine suitability, a member organization also obtain the customer's name, Tax Identification Number, address, and telephone number.

(b) *Basis*

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,<sup>12</sup> in general, and furthers the objectives of Section 6(b)(5),<sup>13</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 facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest, by providing the investing public with options communications rules that are designed to provide appropriate safeguards and greater clarity by promoting harmonization between the Amex and other SRO options communications rules.. The Exchange believes that the proposal is consistent with Section 6(b)(5) because the proposed amendments to Amex Rule 991 reflect recent amendments in the 1933 Act that exempt standardized options and will update and reorganize the Rule.

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

The proposed rule change will impose no burden on competition that is not necessary or appropriate in furtherance of the purposes of the 1934 Act.

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<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

5. **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.

6. **Extension of Time Period for Commission Action**

The Exchange does not consent to an extension of the time period for Commission consideration of the proposed rule change specified in Section 19(b)(2) of the 1934 Act.<sup>14</sup>

7. **Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)**

- (a) Not applicable.
- (b) Not applicable.
- (c) Not applicable.
- (d) Not applicable.

8. **Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission**

The proposed rule change is based on similar proposals by the FINRA, CBOE and NYSE.

9. **Exhibits**

List of Exhibits Filed:

- 1. Notice of Proposed Rule Change for publication in the **Federal Register**.
- 2. Not applicable.
- 3. Not applicable.

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<sup>14</sup> 15 U.S.C. 78s(b)(2).

4. Not applicable.
5. Text of Proposed Rule Change.

**EXHIBIT 1**

**SECURITIES AND EXCHANGE COMMISSION**

**(Release No. 34- ; File No. SR-Amex-2008-51)**

**Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change Related to Amendments to Rule 991 (Communications to Customers)**

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on , 2008, the American Stock Exchange LLC (the “Amex” or the “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 the Exchange. 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 amend Rule 991 (“Communications to Customers”) to delete reference to certain provisions of the Securities Act of 1933 (the “1933 Act”) that no longer apply to standardized options<sup>3</sup> issued by registered clearing agencies and update and reorganize the Rule for greater clarity. In addition, the proposal also seeks to amend Rule 921 (“Opening of Account”) in connection with the documentary material member organizations must obtain from customers.

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> “Standardized option” is defined in Rule 19b-1 under the Securities Exchange Act of 1934 (the “1934 Act”) to mean options contracts trading on a registered national securities exchange, an automated quotation system of a registered national securities association, or a foreign exchange which relate to options classes the terms of which are limited to specific expiration dates and exercise prices, or such other securities as the Commission may, by order, designate.

The text of the proposed rule change is available on the Amex's website at <http://www.amex.com>, the Office of the Secretary, the Amex and at the Commission's Public Reference Room.

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 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

On December 23, 2002, the Securities and Exchange Commission (the "Commission" or "SEC") published final rules that exempt standardized options issued by registered clearing agencies and traded on a registered national securities exchange or registered national securities association from the 1933 Act (other than the anti-fraud provisions) and the registration requirements of the 1934 Act.<sup>4</sup> Since the 1933 Act and the rules thereunder are no longer applicable to standardized options, the Amex proposes to remove elements of the 1933 Act that are embedded in Amex Rule 991. In particular, the Exchange proposes to remove all references to a "prospectus" from Rule 991. There is no longer a need for a prospectus or any references thereto, and The

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<sup>4</sup> See "Exemption for Standardized Options From Provisions of the Securities Act of 1933 and From the Registration Requirements of the Securities Exchange Act of 1934; Final Rule", Securities Act Release No. 8171 and Securities Exchange Act Release No. 47082 (December 23, 2002), 68 FR 188 (January 2, 2003).

Options Clearing Corporation (“OCC”) has, in fact, ceased publication of a prospectus.<sup>5</sup> In addition, the amendments proposed will update and reorganize Rule 991. For uniformity, the Financial Industry Regulatory Authority, Inc. (“FINRA”), the New York Stock Exchange (“NYSE”) and the Chicago Board Options Exchange, Inc. (“CBOE”) have all filed rule amendments with the Commission to implement similar rule language and format changes.<sup>6</sup>

### **Deletion of Certain Provisions of Rule 991**

Amex Rule 991 contains a number of references to a prospectus and other 1933 Act requirements. The Exchange proposes to delete the following from Rule 991:

- Rule 991(a)(iv), which references the 1933 Act prospectus definition;
- Rule 991(d), which embodies 1933 Act principles in that it prohibits written material concerning options (i.e., an offering) from being furnished to any person who has not previously or contemporaneously received the current ODD (an alternative to a prospectus);
- Rule 991(e)(ii), which defines the term “educational material”;<sup>7</sup>
- Commentary .02A to Rule 991, which outlines what is permitted in an “advertisement”,<sup>8</sup> and
- Commentary .03 to Rule 991, which concerns educational material.<sup>9</sup>

### **Re-designation of Rule 991(a) to Proposed Rule 991(d) and Related Amendments**

Amex Rule 991(a) currently provides an outline of the “General Rule” for options communications. The Exchange proposes to re-designate paragraph (a)

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<sup>5</sup> The options disclosure document (the “ODD”) prepared in accordance with Rule 9b-1 under the 1934 Act is not deemed to be a prospectus. 17 CFR §230.135b. *See e.g.* Securities Act Release No. 8049 (December 21, 2001), 67 FR 228 (January 2, 2002).

<sup>6</sup> See SR-FINRA-2008-13, SR-CBOE-2007-30 and SR-NYSE-2006-50.

<sup>7</sup> This paragraph essentially incorporates language of Rule 134a under the 1933 Act. While this amendment would eliminate the separate educational material category, as discussed below, the Exchange also proposes to revise the definition of Sales Literature to include educational material.

<sup>8</sup> This paragraph essentially incorporates language of Rule 134 under the 1933 Act.

<sup>9</sup> *See supra* note 7.

as paragraph (d), and to incorporate limitation on the use of options communications contained in current Commentary .01 to Rule 991 into proposed Rule 991(d). In addition, proposed Rule 991(d)(iii) would amend Rule 991(a)(iii) by clarifying the types of cautionary statements and caveats that are prohibited. As previously noted, the Amex proposed to delete Rule 991(a)(iv).

### **Proposed Amendments to Rule 991(b)**

Amex proposes to amend Rule 991(b) to include the types of communications proposed to be added to the definition of “Options Communications” in proposed Rule 991(a). Proposed Rule 991(b)(ii) and (b)(iii) would also amend the current requirements to obtain advanced approval by a Registered Options Principal (“ROP”) for most options communications by exempting certain options communications, defined as “Correspondence” and “Institutional Sales Material. Specifically, proposed Rule 991(b)(ii) would exempt Correspondence from the pre-approval requirement unless the Correspondence is distributed to 25 or more existing retail customers within any 30 calendar day period and make any financial or investment recommendation or otherwise promotes a product or service of the member. Proposed Rule 991(b)(iii) would exempt Institutional Sales Material from the pre-approval requirement if the material is distributed to “qualified investors” as defined in Section 3(a)(54) of the 1934 Act.<sup>10</sup>

Pre-approval by a ROP would, however, be required with respect to independently prepared reprints. In addition, proposed Rule 991(b)(iv) would require that firms retain options communications in accordance with the recordkeeping

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<sup>10</sup> See 15 U.S.C. §78c(a)(54).

requirements of Rule 17a-4 under the 1934 Act.<sup>11</sup> The proposed rule would also require firms retain other related documents in the form and for the time periods required for options communications by Rule 17a-4.

### **Proposed Amendments to Rule 991(c)**

Rule 991(c) currently requires members and member organizations to obtain approval for every advertisement and all educational material from the Exchange. This requirement applies regardless of whether the options communications are used before or after delivery of a current ODD. The Exchange proposes to amend this provision to require approval by the Exchange only with respect to communications used prior to the delivery of a current ODD. The Exchange's pre-approval requirement of options communications used subsequent to the delivery of the ODD is being eliminated because the ODD should help alert the customer to the characteristics and risks associated with trading in options and because Rule 991(b) requires the ROP of a member organization to pre-approve options communications subject to exceptions for "Correspondence" and "Institutional Sales Material." Rule 991(c) would also be amended to include the types of communications added to the definition of "Options Communications" in proposed Rule 991(a).

### **Re-designation of Rule 991(e) to Proposed Rule 991(a) and Related Amendments**

Rule 991(e) currently defines the terms used in Rule 991. The Amex proposes to re-designate paragraph (e) as paragraph (a). The Exchange also proposes to amend the definition of "Options Communications" in proposed Rule 991(a)

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<sup>11</sup> 17 CFR §240.17a-4. More specifically, Rule 17a-4(b)(4) requires that a broker-dealer retain "originals of all communications received and copies of all communications sent .....including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public."

to expand the types of communications governed by Rule 991 to include independently prepared reprints and other communications between a member or member organization and a customer. The Exchange proposed to amend the definitions of “Advertisement” and “Sales Literature;” and define “Correspondence,” “Institutional Sales Material,” “Public Appearances” and “Independently Prepared Reprints” to clarify the Rule. In addition, as previously noted, Amex proposes to delete the definition of “Educational Material.”

### **Proposed Rule 991(e)**

Proposed Rule 991(e) would set forth (i) standards for options communications that are not preceded or accompanied by an ODD and (ii) standards for options communications used prior to delivery of an ODD. These requirements generally clarify and restate the requirements contained in current Commentary .02 to Rule 991.

### **Related Commentaries**

Proposed Rule 991(e)(i)(B) requires options communications to contain contact information for obtaining a copy of the ODD. Proposed Commentary .01 to Rule 991 would include the provisions found in current Commentary .02A to Rule 991 regarding how this requirement may be satisfied. In addition, as noted above, the provisions of current Commentary .01 to Rule 991 regarding limitations on the use of options communications are proposed to be incorporated into proposed Rule 991(d).

As previously noted, the provisions of current Commentary .02 to Rule 991 outline what is permitted in an advertisement, are proposed to be deleted and the provisions relating to standards for options communications used prior to delivery of the ODD are proposed to be incorporated into proposed Rule 991(e)(ii).

Current Commentary .03 to Rule 991 regarding educational materials is proposed to be deleted as noted above.

Current Commentary .04 to Rule 991 sets forth the standards applicable to Sales Literature. Current Commentary .04A sets forth the requirement that Sales Literature shall state that supporting documentation for any claims, comparisons, recommendations, statistics or other technical data, will be supplied upon request. The Exchange proposes to re-designate current Commentary .04A as proposed Rule 991(d)(vii).

Current Commentary .04B to Rule 991 relates to standards for Sales Literature that contain projected performance figures. Current Commentary .04C relates to standards for Sales Literature that contains historical performance figures. The Exchange proposes to re-designate current Commentary .04B as proposed Commentary .02 to Rule 991 and current Commentary .04C as proposed Commentary .03 to Rule 991.

Rule 991 currently requires that a copy of the ODD precede or accompany options related sales literature. The Exchange proposes to modify the ODD delivery requirement applicable to sales literature to provide that an ODD must precede or accompany any communication that conveys past or projected performance figures involving options or constitutes a recommendation pertaining to options.<sup>12</sup>

A notice providing the name and address of a person from whom the ODD may be obtained would be required in sales literature that does not contain a recommendation of past or projected performance figures. Because Amex is proposing to merge educational material into the sales literature category,<sup>13</sup> this amendment would

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<sup>12</sup> See proposed Rule 991(e)(i)(C) and proposed Commentaries .02 and .03 to Rule 991.

<sup>13</sup> See proposed Rule 991(a)(ii).

continue to allow communications that are educational in nature to be disseminated without being preceded or accompanied by a copy of the ODD.

The Exchange proposes to re-designate current Commentary .04D to Rule 991 as proposed Commentary .04 to Rule 991. The Exchange proposes to delete current Commentaries .04E, F and G to Rule 991. The Exchange believes Commentaries .04E and F are unnecessary because worksheets are included in the definition of Sales Literature. In addition, the Exchange believes Commentary .04G is no longer necessary because the Exchange is proposing to clarify the recordkeeping requirements applicable to options communications in proposed Rule 991(b)(iv).

The proposal further seeks to amend Rule 921 in connection with the opening of options accounts. Currently, Commentary .01 to Rule 921 requires a member organization to obtain certain information about their options customers in order to comply with the due diligence requirement in opening a new account under Rule 921(c). In order to conform to the requirements of Rule 17a-3(a)(17) under the 1934 Act, the proposed amendments would require that in addition to all the essential information to determine suitability, a member organization also obtain the customer's name, Tax Identification Number, address, and telephone number.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,<sup>14</sup> in general, and furthers the objectives of Section 6(b)(5),<sup>15</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

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<sup>14</sup> 15 U.S.C. 78f(b).

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

with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest, by providing the investing public with options communications rules that are designed to provide appropriate safeguards and greater clarity by promoting harmonization between the Amex and other SRO options communications rules.. The Exchange believes that the proposal is consistent with Section 6(b)(5) because the proposed amendments to Amex Rule 991 reflect recent amendments in the 1933 Act that exempt standardized options and will update and reorganize the Rule.

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

The proposed rule change does not impose any burden on competition that is 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

(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 [rulecomments@sec.gov](mailto:rulecomments@sec.gov). Please include File Number SR-Amex-2008-51 on the subject line.

Paper Comments:

Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Amex-2008-51. 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 Section, 100 F Street, NE,

Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. 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–2008–51 and should be submitted on or before [insert date 21 days from date of publication].

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

Nancy M. Morris  
Secretary

Dated:

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<sup>16</sup> 17 CFR 200.30-3(a)(12).

**AMERICAN STOCK EXCHANGE LLC**  
**Proposed Rule Change**

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It is proposed that the following provisions of the Rulebook of the American Stock Exchange LLC be amended as set forth below. Additions are underlined and deletions are [bracketed].

**Rule 921. Opening of Accounts**

(a) through (g) No Change

••• *Commentary* -----

**.01** In fulfilling its obligations pursuant to paragraph (c) of this Rule with respect to options customers that are natural persons, a member organization shall seek to obtain the following information at a minimum (information shall be obtained for all participants in a joint account):

1. Investment objectives (e.g., safety of principal, income, growth, trading profits, speculation)
2. Employment status (name of employer, self-employed or retired)
3. Estimated annual income from all sources
4. Estimated net worth (exclusive of family residence)
5. Estimated liquid net worth (cash, securities, other)
6. Marital status; number of dependents
7. Age, name, Tax Identification Number, address and telephone number
8. Investment experience and knowledge (e.g., number of years, size, frequency and types of transactions) for options, stocks and bonds, commodities, other

In addition, the customer's account records shall contain the following information, if applicable:

- a. Source or sources of background and financial information (including estimates) concerning the customer

- b. Discretionary trading authorization: agreement on file; name, relationship to customer and experience of person holding trading authority
- c. Date appropriate Options Disclosure Document(s) furnished to customer
- d. Nature and types of transactions for which account is approved (e.g., buying, covered writing, uncovered writing, spreading, discretionary transactions)
- e. Name of registered representative
- f. Name of ROP approving account; date of approval
- g. Dates of verification of currency of account information

The member organization should consider utilizing a standard account approval form so as to ensure the receipt of all the required information.

**.02 through .04** No Change

#### **Rule 991. Options Communications [to Customers]**

[(a) **General Rule.**—No member or member organization or person associated with a member shall utilize any advertisement, educational material, sales literature or other communications to any customer or member of the public concerning options which:

- (i) contains any untrue statement or omission of a material fact or is otherwise false or misleading;
- (ii) contains promises of specific results, exaggerated or unwarranted claims, opinions for which there is no reasonable basis or forecasts of future events which are unwarranted or which are not clearly labelled as forecasts;
- (iii) contains hedge clauses or disclaimers which are not legible, which attempt to disclaim responsibility for the content of such literature or for opinions expressed therein, or which are otherwise inconsistent with such communication; or
- (iv) would constitute a prospectus as that term is defined in the Securities Act of 1933, unless it meets the requirements of Section 10 of said Act.]

(a) Definitions. For purposes of this Rule and any interpretation thereof, “Options Communications” consist of:

- (i) Advertisements. The term “Advertisement” shall include any material concerning options, other than an independently prepared reprint and institutional sales material, that is published, or used in any electronic or other public media, including any Web site, newspaper, magazine or other periodical, radio, television, telephone or tape recording, videotape display, signs or billboards, motion pictures, or telephone directories (other than routine listings).

- (ii) Sales Literature. The term “Sales Literature” shall include any written or electronic communication not defined as an "advertisement" that is generally available to customers or the public including circulars, research reports, market letters, performance reports or summaries, worksheets, form letters, telemarketing scripts, seminar texts, reprints (that are not independently prepared reprints) or excerpts of any other advertisement, sales literature or published article, and press releases concerning a member organization’s products or services.
  - (iii) Correspondence. The term “Correspondence” shall include any written letter or electronic mail message distributed by a member or member organization to: (A) one or more of its existing retail customers; and (B) fewer than 25 prospective retail customers within any 30 calendar day period.
  - (iv) Institutional Sales Material. The term “Institutional Sales Material” shall include any communication concerning options that is distributed or made available only to institutional investors. The term institutional investor shall mean any qualified investor as defined in Section 3(a)(54) of the Securities Exchange Act of 1934.
  - (v) Public Appearance. The term “Public Appearance” shall include, without limitation, any participation in a seminar, forum (including an interactive electronic forum), radio, television or print media interview, or other public speaking activity concerning options.
  - (vi) Independently Prepared Reprint. The term “Independently Prepared Reprint” shall include: (A) Any reprint or excerpt of any article concerning options issued by a publisher, provided that: (1) the publisher is not an affiliate of the member organization using the reprint or any underwriter or issuer of a security mentioned in the reprint or excerpt and that the member organization is promoting; (2) neither the member organization using the reprint or excerpt nor any underwriter or issuer of a security mentioned in the reprint or excerpt has commissioned the reprinted or excerpted article; and (3) the member organization using the reprint or excerpt has not materially altered its contents except as necessary to make the reprint or excerpt consistent with applicable regulatory standards or to correct factual errors;
- (b) **Approval by Registered Options Principal**—(i) All advertisements, [educational material and] sales literature (except completed worksheets), and independently prepared reprints issued by a member or member organization pertaining to options shall be approved in advance by an appropriate Registered Options Principal designated by the member or member organization's written supervisory procedures. [Copies thereof, together with the names of persons who prepared the material, the names of the persons who approved the material and, in the case of sales literature, the source of any recommendations contained therein, shall be retained by the member or member

organization and be kept at an easily accessible place for examination by the Exchange for a period of three years.]

(ii) Correspondence need not be approved by a Registered Options Principal prior to use unless such correspondence is distributed to 25 or more existing retail customers within any 30 calendar day period and makes any financial or investment recommendation or otherwise promotes a product or service of the member. All correspondence is subject to the supervision and review requirements of Rule 922.

(iii) Institutional sales material relating to options need not be approved by a Registered Options Principal prior to use, but is subject to the supervision and review requirements as set forth in the written supervisory procedures of the member or member organization.

(iv) Copies of the options communications shall be retained by the member or member organization in accordance with SEC Rule 17a-4 under the Securities Exchange Act of 1934. The names of the persons who prepared the options communications, the names of the persons who approved the options communications and the source of any recommendations contained therein, shall be retained by the member or member organization and be kept in accordance with SEC Rule 17a-3 and 17a-4 under the Securities Exchange Act of 1934.

**(c) Exchange Approval Required[ for Options Advertisements and Educational Material]**—In addition to the approval required by paragraph (b) of this Rule, [every] all advertisements, [and all educational material] sales literature and independently prepared reprints of a member or member organization pertaining to standardized options that is not accompanied or preceded by the applicable current options disclosure document (“ODD”) shall be submitted to the Exchange at least ten calendar days prior to use (or such shorter period as the Exchange may allow in particular instances) for approval and, if changed or expressly disapproved by the Exchange, shall be withheld from circulation until any changes specified by the Exchange have been made or, in the event of disapproval, until the communication [advertisement or educational material] has been resubmitted for, and has received. Exchange approval. The requirements of this paragraph shall not be applicable to:

(i) [advertisements or educational material] options communications submitted to another self-regulatory organization having comparable standards pertaining to such communications [advertisements and educational material] and

(ii) communications [advertisements or educational material] in which the only reference to options is contained in a listing of the services of [a] the member organization.

(d) General Rule. No member or member organization or associated person shall use any options communication which:

(i) Contains any untrue statement or omission of a material fact or is otherwise false or misleading.

(ii) Contains promises of specific results, exaggerated or unwarranted claims, opinions for which there is no reasonable basis or forecasts of future events which are unwarranted or which are not clearly labeled as forecasts.

(iii) Contains cautionary statements or caveats that are not legible, are misleading or are inconsistent with the content of the materials.

(iv) Contains statements suggesting the certain availability of a secondary market in options.

(v) Fails to reflect the risks attendant to options transactions and the complexities of certain options investment strategies. Any statement referring to the potential opportunities presented by options shall be balanced by a statement of the corresponding risks. The risk statement shall reflect the same degree of specificity as the statement of opportunities, and broad generalities must be avoided.

(vi) Fails to include a warning to the effect that options are not suitable for all investors or contains suggestions to the contrary.

(vii) Fails to include a statement that supporting documentation for any claims (including any claims made on behalf of options programs or the options expertise of sales persons), comparisons, recommendations, statistics or other technical data, will be supplied upon request.

Paragraphs (vi) and (vii) shall not apply to institutional sales material as defined in this Rule 991.

(e) Standards Applicable to Options Communications.

(i) Unless preceded or accompanied by the ODD, options communications, with the exception of public appearances, shall:

(A) Be limited to general descriptions of the options being discussed;

(B) Contain contact information for obtaining a copy of the ODD; and

(C) Not contain recommendations or past or projected performance figures, including annualized rates of return or names of specific securities.

(ii) Options communications used prior to ODD delivery may:

(A) Contain a brief description of options, including a statement that identifies registered clearing agencies for options. The text may also contain a brief description of the general attributes and method of operation of the exchanges on which options are traded, including a discussion of how an option is priced.

(B) Include any statement required by any state law or administrative authority.

(C) Include advertising designs and devices, including borders, scrolls, arrows, pointers, multiple and combined logos and unusual type faces and lettering as well as attention-getting headlines and photographs and other graphics, provided such material is not misleading.

**[(d) Delivery of Disclosure Document(s).—**Except with respect to educational material, or as otherwise provided in the Commentary hereunder, no written materials respecting options may be disseminated to any person who has not previously or contemporaneously received the appropriate current Options Disclosure Document(s).]

**[(e) Definitions.—**For purposes of this Rule, the following definitions shall apply:

(i) The term "advertisement" shall include any sales material that reaches a mass audience through either public media such as newspapers, periodicals, magazines, radio, television, telephone recording, motion picture, audio or video device, telecommunications device, billboards, signs, or through written communications to customers or the public that are not required to be accompanied or preceded by the appropriate current Options Disclosure Document(s).

(ii) The term "educational material" shall include any explanatory material distributed or made generally available to customers or the public that is limited to information describing the general nature of the standardized options markets or one or more strategies.

(iii) The term "sales literature" shall include any written communication (not defined as an "advertisement" or as "educational material") distributed or made available to customers or the public that contains any analysis, performance report, projection or recommendation with respect to options, underlying securities or market conditions, any standard forms of worksheets, or any seminar text which pertains to options and which is communicated to customers or the public at seminars, lectures or similar such events.]

• • • *Commentary* -----

**.01** The Rule 991(e)(i)(B) requirement to include contact information for obtaining a copy of the ODD may be satisfied by providing the name and address of one or more telephone numbers from which the current options disclosure document may be obtained; directing existing clients to contact their registered representative; or including a response card through which a current ODD may be obtained. An internet address may also be used, however, such an address must be accompanied by either a telephone number or mailing address for use by those investors who do not have access to the internet. [The special risks attendant to options transactions and the complexities of certain options investment strategies shall be reflected in any advertisement, educational material or sales literature which discusses the uses or advantages of options. Such communications shall include a warning to the effect that options are not suitable for all investors. In the preparation of written communications respecting options, the following guidelines should be observed:

A. Any statement referring to the potential opportunities or advantages presented by options shall be balanced by a statement of the corresponding risks. The risk statement shall reflect the same degree of specificity as the statement of opportunities, and broad generalities should be avoided. Thus, a statement such as "with options, an investor has an opportunity to earn profits while limiting his risk of loss," should be balanced by a statement such as "of course, an options investor may lose the entire amount committed to options in a relatively short period of time."

B. It shall not be suggested that options are suitable for all investors.

C. Statements suggesting the certain availability of a secondary market for options shall not be made.]

**[.02** Advertisements pertaining to options shall conform to the following standards:

A. Advertisements may only be used (and copies of the advertisements may be sent to persons who have not received the appropriate Options Disclosure Document(s)) if the material meets the requirements of Rule 134 under the Securities Act of 1933, as that Rule has been interpreted as applying to options. Under Rule 134, advertisements must be limited to general descriptions of the security being offered and of its issuer. Advertisements under this Rule shall state the name and address of the person from whom the appropriate current Options Disclosure Document(s) may be obtained<sup>1</sup>. Such advertisements may have the following characteristics:

(i) The text of the advertisement may contain a brief description of such options, including a statement that the issuer of every such option is The Options Clearing Corporation. The text may also contain a brief description of the general attributes and method of operation of the exchange or exchanges on which such options are traded and of The Options Clearing Corporation, including a discussion of how the price of an option is determined on the trading floor(s) of such exchange(s);

(ii) The advertisement may include any statement required by any state law or administrative authority;

(iii) Advertising designs and devices, including borders, scrolls, arrows, pointers, multiple and combined logos and unusual type faces and lettering as well as attention-getting headlines and photographs and other graphics may be used, provided such material is not misleading.

B. The use of recommendations or of past or projected performance figures, including annualized rates of return, is not permitted in any advertisement pertaining to options.

**.03** Educational material, including advertisements, pertaining to options may be used if the material meets the requirements of Rule 134a under the Securities Act of 1933 (the "Act"). Those requirements are as follows:

(i) The potential risks related to options trading generally and to each strategy addressed are explained;

(ii) No past or projected performance figures, including annualized rates of return are used;

(iii) No recommendation to purchase or sell any option contract is made;

(iv) No specific security is identified other than

(a) a security which is exempt from registration under the Act or an option on such exempt security, or

(b) an index option, including the component securities of the index; and

(v) The material contains the name and address of a person or persons from whom the appropriate current Options Disclosure Documents(s), as defined in Rule 9b-1 of the Securities Exchange Act of 1934, may be obtained.<sup>1]</sup>

**.02[.04] Projections.** [Sales literature pertaining to options shall conform to the following standards:

A. Sales literature shall state that supporting documentation for any claims (including any claims made on behalf of options programs or the options expertise of sales persons), comparisons, recommendations, statistics or other technical data, will be supplied upon request.]

[B.] Options [Such] communications may contain projected performance figures (including projected annualized rates of return), provided that:

(i) All such communications are accompanied or preceded by the ODD.

(ii)[(i) n]No suggestion of certainty of future performance is made.[];

(iii)[(ii) p]Parameters relating to such performance figures are clearly established (e.g., to indicate exercise price of option, purchase price of the underlying stock and its market price, option premium, anticipated dividends, etc.)[];

(iv)[(iii) a]All relevant costs, including commissions, fees and interest charges ([if] as applicable [with regard to margin transactions]) are disclosed[];

(v)[(iv) s]Such projections are plausible and are intended as a source of reference or a comparative device to be used in the development of a recommendation[];

(vi)[(v) a]All material assumptions made in such calculations are clearly identified (e.g., "assume option exercised," etc.)[];

(vii)[(vi) t]The risks involved in the proposed transactions are also discussed[];

(viii)[(vii) i]In communications relating to annualized rates of return, that such returns are not based upon any less than a sixty-day experience; any formulas used in making calculations are clearly displayed; and a statement is included to the effect that the annualized returns cited might be achieved only if the parameters described can be duplicated and that there is no certainty of doing so.

**.03[C.] Historical Performance.** [Such] Options communications may feature records and statistics which portray the performance of past recommendations or of actual transactions, provided that:

(i) All such communications are accompanied or preceded by the ODD.

(ii)[(i) a]Any such portrayal is done in a balanced manner, and consists of records or statistics that are confined to a specific "universe" that can be fully isolated and circumscribed and that covers at least the most recent 12-month period[];

(iii)[(ii) s]Such communications include the date of each initial recommendation or transaction, the price of each such recommendation or transaction as of such date, and the date and price of each recommendation or transaction at the end of the period or when liquidation was suggested or effected, whichever was earlier; provided that if the communications are limited to summarized or averaged records or statistics, in lieu of the complete record there may be included the number of items recommended or transacted, the number that advanced and the number that declined, together with an offer to provide the complete record upon request[];

(iv)[(iii) such communications disclose a] All relevant costs, including commissions, fees and interest charges ([if] as applicable [with regard to margin transactions]) are disclosed.

[and,]

(v) W[w] whenever such communications contain annualized rates of return [are used], all material assumptions used in the process of annualization are disclosed[;].

(vi)[(iv) a] An indication is provided of the general market conditions during the period(s) covered, and any comparison made between such records and statistics and the overall market (e.g., comparison to an index) is valid[;].

(vii)[(v) s] Such communications state that the results presented should not and cannot be viewed as an indicator of future performance[; and].

(viii)[(vi) a] A Registered Options Principal determines that the records or statistics fairly present the status of the recommendations or transactions reported upon and so initials the report.

**.04[D.] Options Program.** In communications regarding [the case of] an options program (i.e., an investment plan employing the systematic use of one or more options strategies), the cumulative history or unproven nature of the program and its underlying assumptions shall be disclosed.

[E. Standard forms of options worksheets utilized by member organizations, in addition to complying with the requirements applicable to sales literature, must be uniform within a member organization for each product type (e.g. equity, index, interest rate, etc.).

F. If a member organization has adopted a standard form of worksheet for a particular options strategy, non-standard worksheets for that strategy may not be used.

G. Communications that portray performance of past recommendations or actual transactions and completed worksheets shall be kept at a place easily accessible to the sales office for the accounts of customers involved.]

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